

BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS

Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF: *
PETITION OF ALAN AND SUSAN DECHTER LLC, *
Petitioner *

Board of Appeals Case No. S-2629
(OZAH Referral No. 05-20)

Alan Dechter *
Bill Landfair *
Allen Neyman *

For the Petitioner *

Stanley D. Abrams, Esq. *
Attorney for the Petitioner *

* * * * *

Martin Klauber, Esquire *
People's Counsel *

Neither in Support of nor in Opposition *
to the Petition *

* * * * *

Before: Françoise M. Carrier, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

	Page No.
I. STATEMENT OF THE CASE	3
II. BACKGROUND	4
<i>A. The Subject Property and Neighborhood.....</i>	<i>5</i>
<i>B. Land Use History</i>	<i>11</i>
<i>C. Master Plan</i>	<i>12</i>
<i>D. Proposed Use</i>	<i>17</i>
<i>E. Landscaping, Lighting and Signage</i>	<i>33</i>
<i>F. Transportation</i>	<i>36</i>
<i>G. Development Standards</i>	<i>44</i>
<i>H. Community Support</i>	<i>45</i>
III. SUMMARY OF HEARING	46
<i>A. Petitioner's Case in Chief</i>	<i>47</i>
<i>B. People's Counsel</i>	<i>63</i>
IV. CONCLUSIONS	63
<i>A. Standard for Evaluation</i>	<i>64</i>
<i>B. Specific Standards</i>	<i>72</i>
<i>C. General Standards</i>	<i>82</i>
V. RECOMMENDATIONS	89

I. STATEMENT OF THE CASE

The present case comes to the Board of Appeals (“Board”) on remand, having been denied, then remanded upon reconsideration. See Ex. 75, Order effective April 5, 2006.

Petition S-2629, filed November 12, 2004, requests a special exception under the R-90 Zone to construct a medical practitioner’s office, pursuant to Section 59-G-2.36 of the Zoning Ordinance, on property located at 12817 Georgia Avenue in Silver Spring, known as Parcels P911 and P912, St. Winexburg Subdivision.

Technical Staff of the Maryland-National Capital Park & Planning Commission (“MNCPPC”) reviewed the present petition and, in a report dated May 27, 2005 (the “2005 Staff Report”), recommended *approval* with conditions.¹ See Ex. 27. The Montgomery County Planning Board considered this petition at its meeting of June 2, 2005 and voted, 5 to 0, to recommend *approval* with conditions. Technical Staff submitted supplemental memoranda on June 10, July 21 and October 19, 2005 at the Hearing Examiner’s request. See Exs. 30, 55 and 61.

On December 2, 2004 the Board scheduled a public hearing in this matter for March 14, 2005, to be conducted by a Hearing Examiner with the Office of Zoning and Administrative Hearings. The public hearing was subsequently postponed to June 14, 2005, with proper notice, to allow the Petitioners to submit revisions to their site plan in response to concerns identified by Technical Staff. The public hearing was convened on June 14, 2005, at which time testimony and other evidence were received in support of the proposed special exception. After being held open for supplemental submissions and corrections, the record closed on October 20, 2005. The Hearing Examiner issued a Report and Recommendation recommending *approval* with conditions on October 21, 2005. On November 2, 2005, the Board voted 3 to 2 to deny the special exception, on grounds that the proposed use would be incompatible with neighboring uses due to the volume of patients, then set at a maximum of 80 per day, and the resulting size of the proposed building and parking area, as well as the amount of traffic that would be generated. The Board further found that the proposed use would not conform to

¹ The Staff Report has been liberally paraphrased and cited in Part I of this report.

the Sector Plan's emphasis on increasing housing opportunities in the area, or its specific recommendation for the site. The Board further found that the design, scale and bulk of the proposed facility, and the intensity of activity proposed, would be out of harmony with the character of the neighborhood. The Board's extensive, detailed findings are not summarized here for the sake of brevity, but may be found in its Opinion dated February 10, 2005, Exhibit 73.

On February 17, 2006, one week after the issuance of the Board's Opinion, Petitioner requested reconsideration of the Board's decision. See Ex. 74. On March 1, 2006, the Board voted unanimously to grant reconsideration, on grounds that the Petitioner lacked the legal representation at the original hearing that is required for a corporate entity, and remanded the case to the Hearing Examiner. See Resolution effective April 5, 2006, Ex. 75.

On May 26, 2006 Petitioner submitted extensive modifications of its plans to the Hearing Examiner. See Ex. 77. By notice dated July 20, 2006, the Hearing Examiner scheduled a public hearing on August 30, 2006 to consider the revised submissions. Technical Staff submitted a staff report dated August 29, 2006 (the "2006 Staff Report") recommending *approval* with conditions. See Ex. 81. The Planning Board did not reconsider the petition. The Hearing Examiner convened the public hearing as scheduled on August 30, at which time evidence and testimony were presented in support of the application. No evidence was presented in opposition to the petition at either hearing, nor does any appear in the record.

The record was held open until September 20, 2006 for additional submissions by the Petitioner. It was subsequently re-opened to permit corrected submissions, and closed on December 6, 2006.

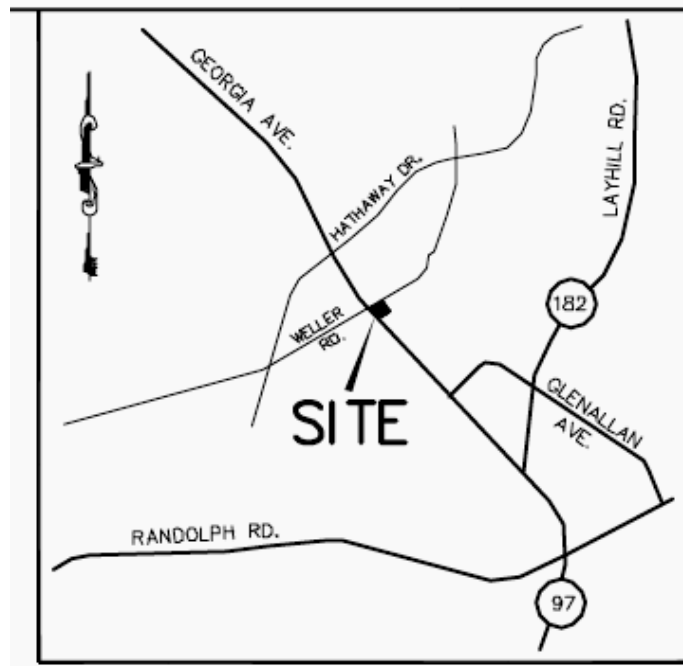
II. BACKGROUND

For the convenience of the reader, background information is grouped by subject matter.

A. The Subject Property and Neighborhood

The subject property is located at 12817 Georgia Avenue in Silver Spring, at the southeast corner of the intersection of Georgia Avenue and Weller Road, a few blocks north of the Glenmont Metro Station and Glenmont Center retail area. It is classified under the R-90 Zone and consists of two parcels with a combined area of approximately 38,387 square feet (.88 acre). The property is irregular in shape and is currently undeveloped. Vegetation includes grass, bushes, a thick stand of bamboo along the eastern boundary, and a number of large, mature trees. These include three trees of particular value, a 29" Walnut, a 30" Maple and a 28" Spruce. The subject property has approximately 223 feet of frontage on Georgia Avenue, along its western boundary, and approximately 224 feet of frontage on Weller Road, along its northern boundary. Its general location can be seen on the area map below.

Area Map, Excerpted from Ex. 60(a)



To the east, the subject property abuts a single family home in the R-90 Zone, which is part of a neighborhood made up mostly of brick ramblers, one-and-a-half to two stories in height. To the south the property abuts Windsor Square, a 46-unit, two-story townhouse community in the RT-12.5 Zone. Confronting the site across Weller Road is the Glenmont United Methodist Church, which has

nearly an acre of land, a large building with an educational wing, and a large parking lot with access from Weller Road. Confronting the site across Georgia Avenue are a single-family home and, immediately adjacent to it, a Pepco substation in a building with a residential appearance. Confronting the site diagonally across Georgia Avenue is Petitioner's existing dental practice, which is located in a single-family residential structure very similar to those around it – small, mostly brick homes.

The dominant feature at this site is Georgia Avenue, which, at this location, is a high-speed, high-volume thoroughfare. Georgia Avenue is one of the County's most heavily traveled highways, and its width, streetscape and traffic so dominate the visual landscape that, as stated by the Petitioner's architect, the growth of this roadway has changed the future of this neighborhood and will continue to result in changes to properties along its border, like the subject site. It creates a setting that is not consistent with the type of quiet, peaceful neighborhood one typically associates with single-family homes.

The photographs that follow depict the subject property and some of the adjacent and confronting land uses.

Subject Property along Georgia Avenue Frontage, Ex. 8(d) top photo



**Walnut Tree along Weller Road to be Preserved, Ex. 8(i) top photo
Educational Wing of Methodist Church in Background, across Weller Road**



Walnut Tree along Weller Road to be preserved

**Georgia Avenue View of Glenmont United Methodist Church,
Northeast Corner of Georgia Avenue and Weller Road. Ex. 8(e) top photo.**



Weller Road View of Glenmont United Methodist Church and Sign, Ex. 8(e) bottom photo



Windsor Square Townhouses Abutting Subject Site to the South, Ex. 8(g) bottom photo



Petitioner's Existing Dental Office, Diagonally across Georgia Avenue from Site, Ex. 34(a)

Technical Staff opined that the general neighborhood of the site extends roughly from Hathaway Drive on the north to Georgia Avenue on the west, the Glenmont Metro Station to the south and Layhill Road to the east. Technical Staff described the “immediate” neighborhood as predominantly residential, in the R-90 Zone. See 2006 Staff Report, Ex. 81, at 4. Testimony and the vicinity map on the next page confirm that much of the general neighborhood is single-family residential in nature, but the area in the immediate vicinity of the subject site has a number of different land uses. The townhouses that abut the subject property on the south sit on a long, narrow parcel that extends east off of Georgia Avenue at an angle. The western edge of the townhouse parcel, along Georgia Avenue, abuts a single-family home on a small lot, which is directly adjacent to another PEPCO substation in a residential-type structure, also on a small lot. Once the townhouse community goes farther back from Georgia Avenue, it abuts another long, narrow lot that also extends east off of Georgia Avenue at an angle. That lot is the site of the First Assembly of God Church. Slightly farther south are a large apartment complex, the Glenmont Metro Station and a retail shopping center called Glenmont Center.

The vicinity map below depicts the subject property and its relationship to nearby land uses, as well as the general neighborhood identified by Technical Staff.

Aerial Photo Provided by Technical Staff²



² This aerial photograph was provided after the initial close of the record at the Hearing Examiner's request. It was generated by Technical Staff using the County's Global Positioning System mapping program. Based on the reliability of this source and its common use in cases before the Board of the Appeals, the Hearing Examiner takes official notice of the aerial photograph above as a product of the GPS system.

B. Land Use History

Dr. Dechter's dental practice has been located across the street from the subject property for 24 years. He testified at the June, 2005 hearing that the two parcels comprising the subject property have been used as a single residential lot since before he came to the neighborhood. Dr. Dechter explained that the property was split into two separate parcels for tax reasons, but only one parcel had a residence on it. The other parcel had a very small guest house that was once occupied by a caretaker for a handicapped child, and later was used for storage. Tr. June 2005 at 141. Dr. Dechter stated that the third building that once stood on the property was used as a garage, with driveway access from Georgia Avenue.

Dr. Dechter testified that after the original owners of the subject property passed away, the property was sold to one of his former patients, who moved to Florida and used the site as a rental property. During that time it was allowed to deteriorate. In August 2003, Montgomery County condemned the residence as uninhabitable. See Ex. 14. Dr. Dechter purchased the site in December 2003. He testified that he would have preferred to preserve the original residence, but was advised by his architect that it was not appropriate in any respect for the kind of use Dr. Dechter proposed. As a result, all of the structures on the property, shown in the photographs that follow, were demolished.

Original Residence on Subject Property, Ex. 37(a) page one



Former Accessory Building on Subject Property, Ex. 37(a) page two

Letters in support and testimony indicate that many people in the neighborhood were delighted when these dilapidated buildings, which were considered an eyesore and a hazard, were removed. Photos of the original residence and accessory buildings are provided below.

C. Master Plan

The subject property is located within the area covered by the *Glenmont Transit Impact Area and Vicinity Sector Plan, Approved and Adopted September 1997* (the “Sector Plan”). The Sector Plan’s vision states the following regarding housing choices (Sector Plan at 9, cited by Technical Staff):

While accommodating appropriate redevelopment in close proximity to metro, this Plan seeks to preserve and enhance the existing viable neighborhoods that surround the center and offer a variety of housing choices. The plan reinforces the existing diverse community by creating new housing opportunities for all income groups, an element of successful mixed-use areas that is under-represented today in Glenmont.

The Sector Plan’s specific objectives for the neighborhoods surrounding the Glenmont Center include maintaining the character and stability of the existing residential neighborhoods and establishing Georgia Avenue as a pedestrian-friendly green boulevard. See Sector Plan, excerpted at Ex. 7, at 69 and 73. The Sector Plan specifically identified the subject property as “suitable for R-90 cluster zoning to facilitate relocation of the existing curb cut from Georgia Avenue to Weller Road.” See

Sector Plan at 69. The Sector Plan's land use map recommends the area including the subject property for single-family residential use, detached or attached. See Sector Plan at 7.

Community-Based Planning Staff at the MNCPPC noted the Sector Plan's specific recommendation for the subject property and concluded that "[I]n general, a dentist's office on this property would be consistent with the objectives of the Glenmont sector plan, if it complies with all other applicable controls and regulations." See 2006 Staff Report at 6; memorandum from Khalid Afzal attached to 2005 Staff Report. Community-Based Planning Staff hewed to this opinion after reviewing the revised plan submitted in May 2006, and found the revised plan consistent with the goals and objectives of the Sector Plan. See 2006 Staff Report at 6. Technical Staff notes that while the Sector Plan finds the subject property suitable for a more intense residential development than the previous single-family use, it does not discourage continuation of the existing single-family detached form of development. 2006 Staff Report at 6. The Staff Report concludes that "the proposed construction of a large single-family structure, albeit with the intended purpose of housing the applicant's dental practice, does not appear to substantially contradict the goals and guidelines of the sector plan." *Id.*

One of Petitioner's land planners, Perry Berman, provided extensive testimony at the June 2005 hearing concerning the Sector Plan, having supervised the preparation of the plan while on MNCPPC staff. Mr. Berman noted, as shown on the map on the next page, that the Sector Plan boundary ends at Weller Road, and recommends intense development around the Metro station.

Mr. Berman noted several zoning changes recommended in the Sector Plan. The biggest one was to recommend redevelopment of the Glenmont garden apartments, an older complex with 200-300 units, under high-intensity Transit Station-Residential zoning. Another was to recommend redevelopment of the Glenmont Shopping Center, south of the Metro station, under the RMX-2C Zone (Residential Mixed-Use Development, Specialty Center, Commercial Base). These recommendations have not been implemented, although Mr. Berman represented that plans to redevelop the apartments under the TS-R Zone are in the works. Tr. June 2005 at 16-17.

Mr. Berman stated that the major goal of the Sector Plan was to increase residential density and improve the character of Glenmont. He noted that the proposed development would achieve the Sector Plan goal of moving the curb cut from Georgia Avenue to Weller Road, and would contribute to the Sector Plan goal of extending a bus way from the Metro station up to Olney, in a designated right-of-way along Georgia Avenue.

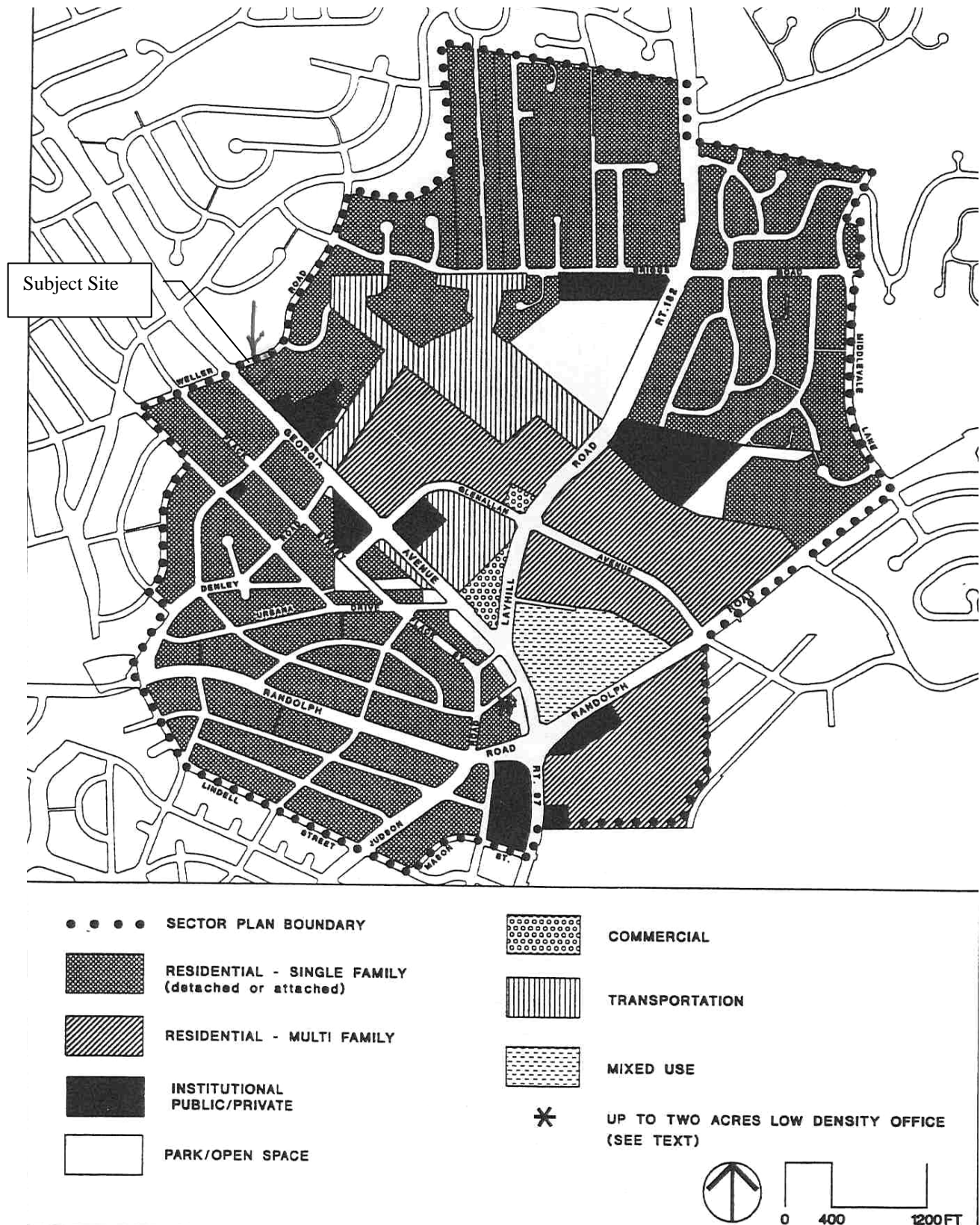
Mr. Berman acknowledged that, as Technical Staff pointed out, the proposed development would result in fewer residential units on the subject property than under the recommended R-90 cluster development. He observed, however, that relative to the 1,500 to 2,000 residential units that the Sector Plan recommended for the Glenmont area, the loss of a few units at the subject site would be de minimis, and would not affect the overall goal of increasing residential development. Tr. June 2005 at 18-19.

Petitioner's second land planner, Bill Landfair, opined that the proposed development would contribute to the Master Plan's goal of enhancing Georgia Avenue by constructing a beautiful building with beautiful landscaping. Tr. Aug. 30 at 58. It would also make the area more pedestrian-friendly, Mr. Landfair suggested, by installing a five-foot sidewalk on Weller Road, where there currently is none. He opined that the proposed development would promote the Master Plan's goal of expanding the range of housing choices for all income groups, by creating a rental unit in a neighborhood where single-family detached and attached homes predominate. He suggested that the residential portion of the proposed building would provide an unusual housing opportunity, perhaps for one of Dr. Dechter's staff members.

Mr. Landfair also addressed the Master Plan's specific recommendation that the subject site would be suitable for R-90 cluster zoning to facilitate relocation of the existing curb cut from Georgia Avenue to Weller Road. Tr. Aug. 2006 at 60. He explained that R-90 cluster development permits development under standards that are different from traditional R-90 development. For instance, the minimum lot size requirement is smaller.³

³ R-90 cluster development can also include townhouses, if the lot meets a certain minimum size, but the subject site is below that minimum, so only single-family detached homes would be permitted.

Proposed Land Use Map from Sector Plan, Ex. 7 at 19



Mr. Landfair presented a conceptual drawing of what R-90 cluster development, which would be permitted by right, might look like on the subject site. The drawing, reproduced below, shows what he considers to be a reasonable development alternative, with three 5,000-square-foot detached homes on individual lots. All of the homes meet the setback requirements, and two of them are shown smaller than the maximum size permitted. Mr. Landfair acknowledged that the drawing depicts larger homes than are typically found in the immediately adjacent neighborhood, but he stated that the sizes would be consistent with current housing trends in the County. Tr. Aug. 2006 at 66. The building heights shown are about the same as the building the Petitioner proposes for the site – two story homes with pitched roofs, about 25 feet high, compared to a mean height for the Petitioner's proposal (averaging the heights of the different roof sections) of nearly 22 feet. In terms of square footage, the Petitioner proposes a total of 5,762 square feet, and the three homes on the conceptual drawing would have a combined total of slightly over 16,000 square feet, including basements.

Potential R-90 Cluster Development on Subject Site, Ex. 87



The Petitioner proposes approximately 10.6 percent lot coverage, and the R-90 cluster drawing depicts combined lot coverage approaching 21 percent. Mr. Landfair noted that the largest home depicted on the conceptual drawing is about the same size as the building the Petitioner proposes – about 70 feet long on its longest side. The total paved area would be slightly smaller for the combined homes than for the layout the Petitioner proposes, due to the parking lot, although the green area would be larger on the Petitioner's plan. Mr. Landfair conceded that it would be possible to build smaller homes under R-90 cluster development, but he suggested, based on his general knowledge of development trends, that a property owner would generally build to maximize his or her investment. Tr. Aug. 2006 at 69. Mr. Landfair emphasized that he did not attempt to create a worst-case scenario in this conceptual drawing, but rather a reasonable and realistic representation. Comparing the conceptual R-90 cluster drawing with the site plan proposed in this case, Mr. Landfair concluded that Petitioner's proposal would result in a much greener appearance, with more landscaping.

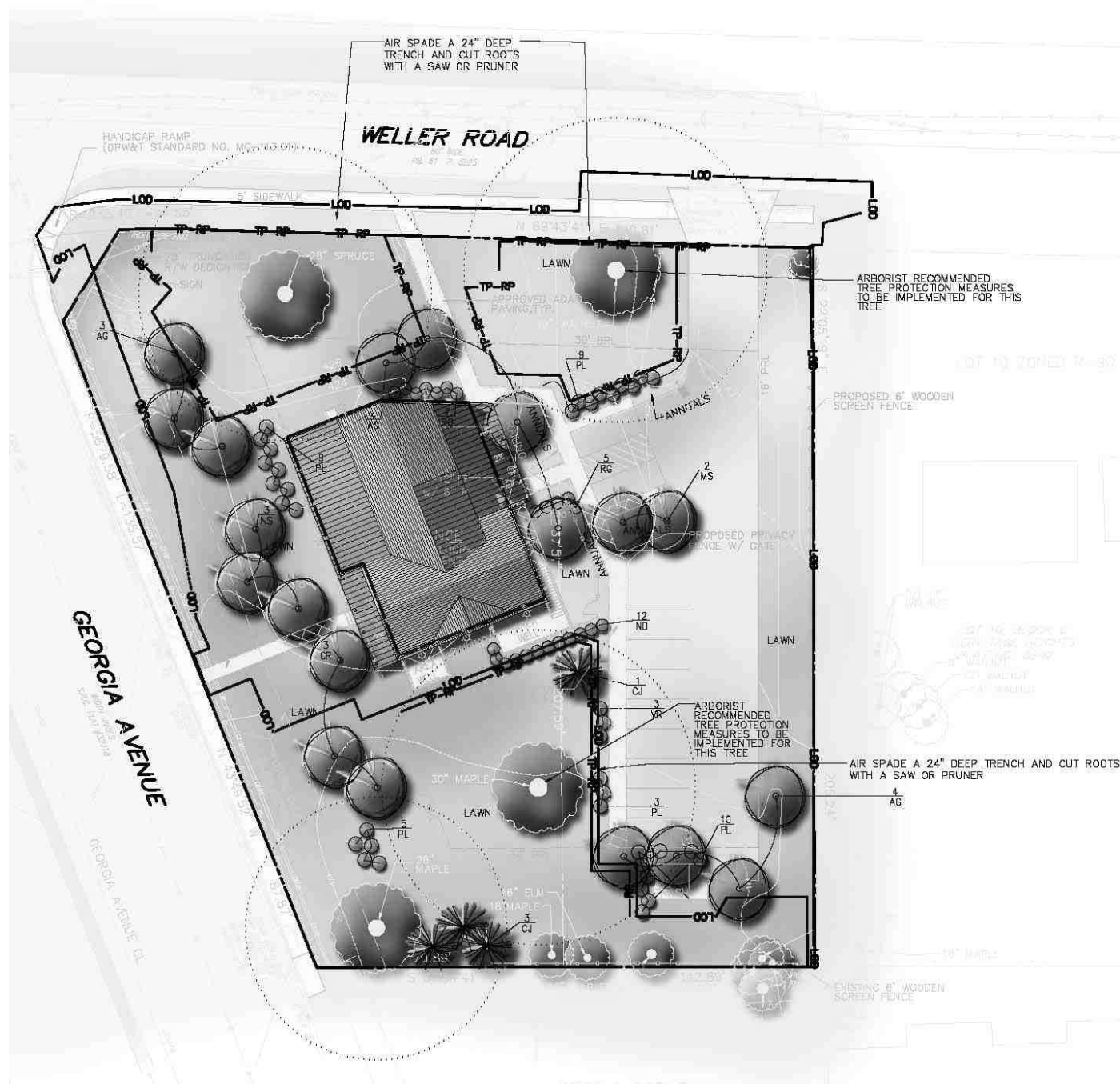
D. Proposed Use

Petitioner proposes to construct a new building, with two stories plus a partial basement, to house a modern dental office, fully accessible to the handicapped, and a residence. The larger facility would allow Petitioner to provide better services, with greater efficiency, and to accommodate more patients. In particular, it would improve conditions for Dr. Dechter's many handicapped or elderly patients. Vehicular access would be from a driveway on Weller Road. Parking would be provided in a surface parking facility behind the building, screened by the building and substantial landscaping. The proposed building would have a total area of 5,762 square feet, with 2,426 square feet (43 percent) dedicated to the dental practice and the remaining 3,336 square feet (57 percent) to residential use. The Petitioner intends to make the residential portion of the building available as a rental unit.

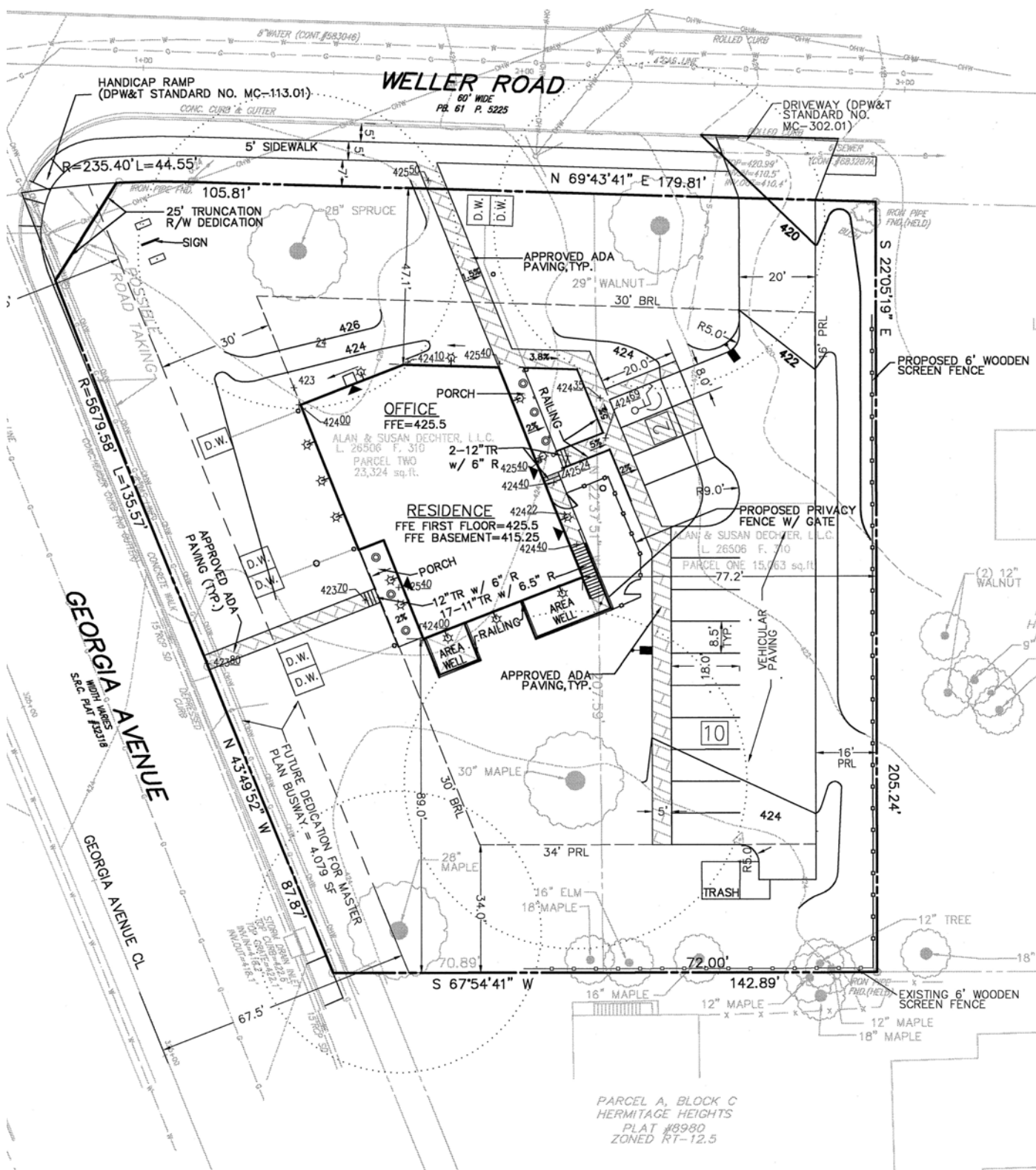
1. Proposed Construction

An illustrative rendering of the combined site plan and landscape plan is provided on the next page. The current site plan is provided on page 19, with the legend, Building Tabulation table, Development Standards table and General Notes on the pages that follow.

Illustrative Rendering of Combined Site Plan and Landscape Plan, Ex. 84



Site Plan Graphics, from Ex. 94(a)



Site Plan Legend, from Ex. 94(a)

LEGEND



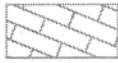
TREE CRITICAL ROOT ZONE



DOWNLIGHT



WALL MOUNTED LIGHT

POLE MOUNTED LIGHT
14' FIXTURE

BRICK PAVING



DRY WELL

PRL

PARKING RESTRICTION LINE

BRL

BUILDING RESTRICTION LINE

Development Standards Table from Site Plan, Ex. 94(a)

	REQUIRED/ALLOWED	PROPOSED
LOT AREA AND WIDTH		
MINIMUM NET LOT AREA FOR A MAIN BUILDING TOGETHER WITH ITS ACCESSORY BUILDINGS	9,000 SQ. FT.	38,061 SQ. FT.
MINIMUM LOT WIDTH	75 FEET	224 FEET
COVERAGE		
MAXIMUM PERCENTAGE OF NET LOT AREA THAT MAY BE COVERED BY BUILDINGS INCLUDING ACCESSORY BUILDINGS	30%	10.6%
F.A.R. (FLOOR AREA RATIO)		0.15
YARD REQUIREMENTS FOR A MAIN BUILDING		
A MAIN BUILDING MUST NOT BE NEARER TO ANY STREET LINE THAN THE DISTANCE SHOWN:		
GEORGIA AVENUE	30 FEET	30 FEET
WELLER ROAD	30 FEET	47.1 FEET
A MAIN BUILDING MUST NOT BE NEARER TO ANY LOT LINE THAN THE FOLLOWING:		
ONE SIDE:	8 FEET	89.0
SUM OF BOTH SIDES:	25 FEET	---
REAR:	30 FEET	77.2 FEET
MAXIMUM BUILDING HEIGHT	35 FEET	21'-9" (RESIDENCE) 18'-0" (OFFICE)
PARKING*		
RESIDENCE:	2 SPACES	2 SPACES
DENTAL OFFICE:	8 SPACES	10 SPACES
TOTAL	10 SPACES	12 SPACES

*ALL PARKING SPACES ARE SURFACE PARKING.

Building Tabulation from Ex. 94(a)**BUILDING TABULATION**

TOTAL OFFICE SPACE	2,426 SQ. FT.
FIRST FLOOR RESIDENCE	1,260 SQ. FT.
SECOND FLOOR RESIDENCE	816 SQ. FT.
BASEMENT AT RESIDENCE	1,260 SQ. FT.
TOTAL RESIDENCE SPACE	3,336 SQ. FT.
TOTAL	5,762 SQ. FT.

General Notes from Site Plan, Ex. 94(a)**GENERAL NOTES:**

1. THE SUBJECT PROPERTY IS LOCATED ON TAX ASSESSMENT MAP NO. HR61 AS PARCELS P911 AND P912 WITH TAX ACCOUNT NO.'S 03349905 AND 00981222.
2. THE HORIZONTAL DATUM (NAD83/91) AND VERTICAL DATUM (NGVD29) IS BASED ON THE FOLLOWING W.S.S.C. CONTROL STATIONS:
 STATION 20044 – WSSC BRASS BOLT IN CONC. ISLAND AT CL. OF GEORGIA AVE., 200' SOUTH OF HATHAWAY DRIVE, NORTH 510154.971 EAST 1295182.977, ELEVATION 430.452

 STATION 20045 – WSSC BRASS DISK IN CL. GRASS ISLAND OF GEORGIA AVE., 400' SOUTH OF RIPPLING BROOK DRIVE, NORTH 511650.565 EAST 1294194.095 ELEVATION 397.30'
3. THE PROPERTY SHOWN HEREON IS LOCATED IN ZONE "C" (AREA OF MINIMAL FLOODING) AS SHOWN ON FLOOD INSURANCE RATE MAP (FIRM) COMMUNITY PANEL NO. 240049 0200 C, DATED AUGUST 5, 1991 AND THEREFORE NO PORTION OF THE PROPERTY SHOWN ON THE SURVEY LIES WITHIN A SPECIAL HAZARD AREA.
4. THE TOTAL AREA OF THIS SITE IS 38,061 SQUARE FEET OR 0.87376 ACRES OF LAND.
5. THE SURVEY WAS MADE ON THE GROUND BETWEEN MARCH 7, 2001 AND MARCH 16, 2001 AND CORRECTLY SHOWS THE AREA OF THE SUBJECT PROPERTY, THE LOCATION AND TYPE OF ALL VISIBLE BUILDINGS, STRUCTURES AND OTHER IMPROVEMENTS SITUATED ON THE SUBJECT PROPERTY, AND ANY OTHER VISIBLE MATTERS SITUATED ON THE SUBJECT PROPERTY.
6. ALL SIDEWALKS SHALL BE IN ACCORDANCE WITH ADA REQUIREMENTS SUCH AS APPROPRIATE PAVEMENT SURFACES, STANDARD DRIVEWAY TREATMENT SO THAT THE SIDEWALK MEETS THE DRIVEWAY PAVEMENT AT GRADE, AND HANDICAPPED RAMPS AT THE CORNER OF GEORGIA AVENUE AND WELLER ROAD.
7. THE MAXIMUM NUMBER OF SCHEDULED PATIENT APPOINTMENTS FOR THE DENTAL OFFICE SHALL NOT EXCEED:
 55 PATIENTS PER FULL WORKING DAY (EXCLUSIVE OF EMERGENCY PATIENTS)
8. THE DENTAL OFFICE USE SHALL BE LIMITED TO TWO MEDICAL PRACTITIONERS, AND 9 PART TIME (4.5 FULL TIME EQUIVALENT) DENTAL ASSISTANTS AND OFFICE STAFF.
9. PRIOR TO ISSUANCE OF SEDIMENT AND EROSION CONTROL PERMITS, A TREE SAVE PLAN MUST BE SUBMITTED BY AN ISA-CERTIFIED ARBORIST, AND DEMONSTRATE FULL COMPLIANCE WITH THE REQUIREMENTS OF FOREST CONSERVATION LAW SECTION 22A-12.
10. LIGHT FIXTURES PERTAINING TO THE RESIDENCE WILL BE UTILIZED ON AN AS NEEDED BASIS BY THE RESIDENTS. LIGHT FIXTURES FOR THE PARKING LOT OF THE DENTIST OFFICE SHALL BE IN USE DURING THE NORMAL OPERATING HOURS OF THE DENTIST OFFICE.

As shown above, the proposed building would contain a total of 5,762 square feet of space. Mr. Landfair estimates the footprint of the building at about 3,200 square feet, excluding porches and the area wells that would provide light and air to the basement. Including the porches and area wells, he estimates the first floor at 4,000 square feet. Compared to the Petitioner's 2005 site plan, the proposed building has been reduced in size by 863 square feet, and its footprint has been reduced by 630 square feet. These reductions were accomplished in part by removing the internal garage, which measured 308 square feet. In addition, the number of operatories (patient treatment rooms) has been reduced from seven to six, and one of the two dentist offices has been moved from the first floor to a second story loft.⁴ Detailed testimony described the space requirements of a modern dental office, which are significantly greater than in years past due to changes in dental technology, requirements of the Americans with Disabilities Act, and records-keeping and privacy requirements imposed under federal law. The Petitioner's architect, Allen Neyman, described the office space currently proposed as the "bare minimum" for two dentists. On the residential side of the building, one of the three bedrooms has been moved from the second story to the basement, to accommodate a decrease in the size of the second floor. (A basement is proposed only underneath the residential portion of the building.)

The relevant points of comparison between the size of the new and old buildings has been a subject of contention. The Board's responsibility at this juncture is, of course, to evaluate the plan that is presently before it. Nonetheless, a brief aside is offered here regarding how one might conduct such a comparison, to sort out the confusion between differing comparisons that were made in the Aug. 2006 Staff Report and in testimony.

Both in testimony at the original hearing and on the 2005 site plan, Exhibit 60(a), Petitioner created the impression that the size of the building then proposed was 6,317 square feet. As a result, the Staff Report, the Hearing Examiner's report and recommendation, and the Board's Opinion in this matter all used that number. In fact, as Petitioner pointed out during the remand hearing, the

⁴ Petitioner's architect opined that this arrangement is consistent with the Americans with Disabilities Act because everything in the second-floor office space would be duplicated in the ground-floor office space, which would be

figure of 6,317 square feet excluded 308 square feet of space that was part of the building, but was to be used as an internal garage rather than office or residential space. See Ex. 60(a), reproduced on page 16 of the Oct. 2005 HE Report. Thus, the full square footage of the building previously proposed was 6,625 square feet.⁵ The plans presented in 2005 also included a free-standing garage that measured an additional 625 square feet. See *id.*

Petitioner argues that the total square footage of all buildings proposed in 2005, including the free-standing garage (7,250 square feet total), should be compared to the square footage of the one building now proposed (5,762 square feet). This comparison leads to the conclusion that the building proposed now is 21 percent smaller than the total square footage of all building construction that was proposed in 2005. Technical Staff compares the size shown for the main building on the 2005 site plan, without the internal garage (6,317 square feet), with the size of the one building now proposed (5,762 square feet). See Staff Report at 3. This comparison leads to a conclusion that the building proposed now is approximately nine percent smaller than the main building proposed in 2005. See *id.*

The Hearing Examiner finds that Technical Staff's comparison unfairly minimizes the extent to which the Petitioner has reduced the size of the building. Petitioner's comparison, on the other hand, somewhat exaggerates the extent of the reduction. It is true that the total square footage of building construction proposed for the site has been reduced by 21 percent, but that comparison includes an accessory structure that would have had less visual impact than the main building. The main building would have been the primary feature of the site under the old plan, and its compatibility with the general neighborhood is one of the salient issues in the case. Accordingly, the Hearing Examiner finds the most relevant and useful comparison to be between the size of the building proposed now (5,762 square feet) and the correct size of the main building proposed in 2005, including the internal garage (6,625 square feet). Based on this comparison, the Petitioner has reduced the size

fully accessible.

⁵ The Aug. 2006 Staff Report continues to describe the size of the building proposed in 2005 as 6,317 square feet. See Ex. 81 at 3. Staff also incorrectly lists the square footage currently proposed for office use as 2,690 square feet, which was the amount proposed in 2005. See *id.* The current plan proposes 2,426 square feet of office space.

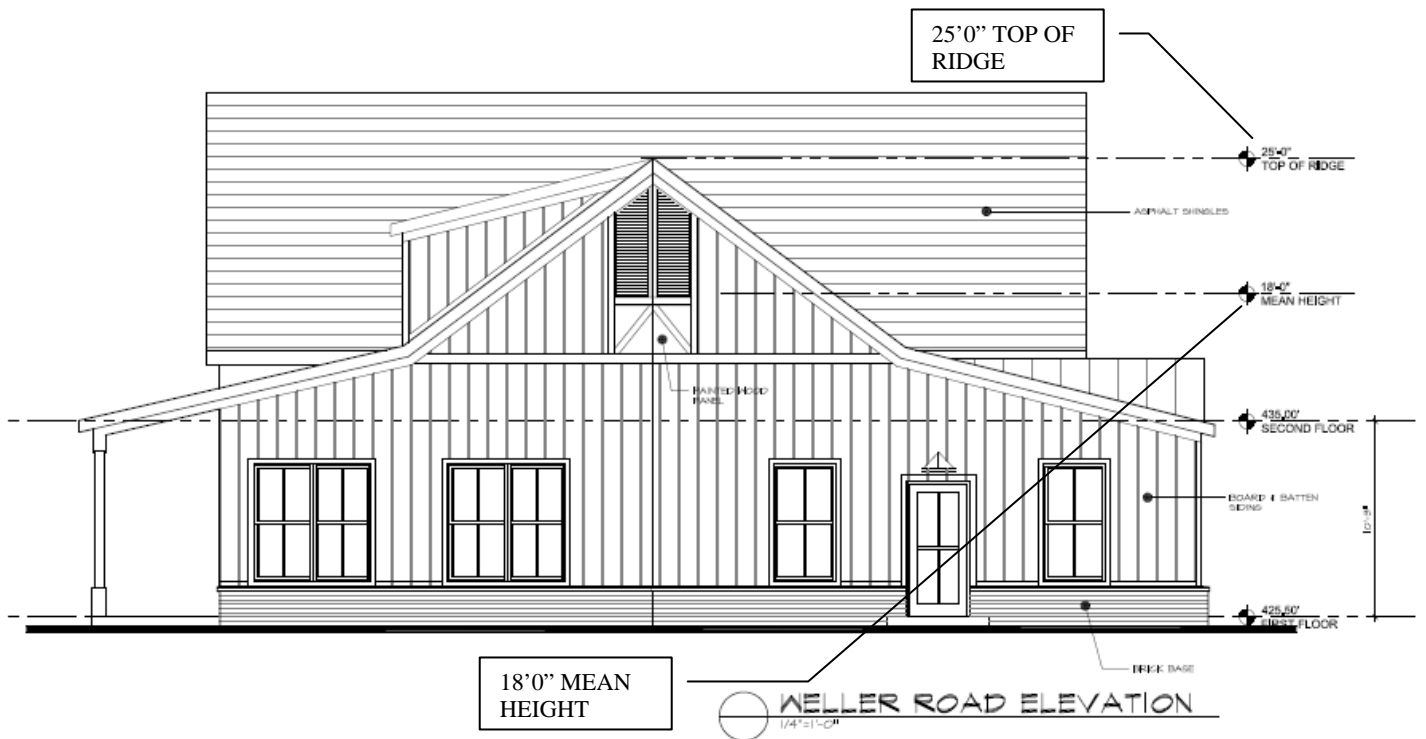
of the proposed building by approximately 13 percent. The comparisons proposed by the Petitioner and by the Hearing Examiner are presented in the table below:

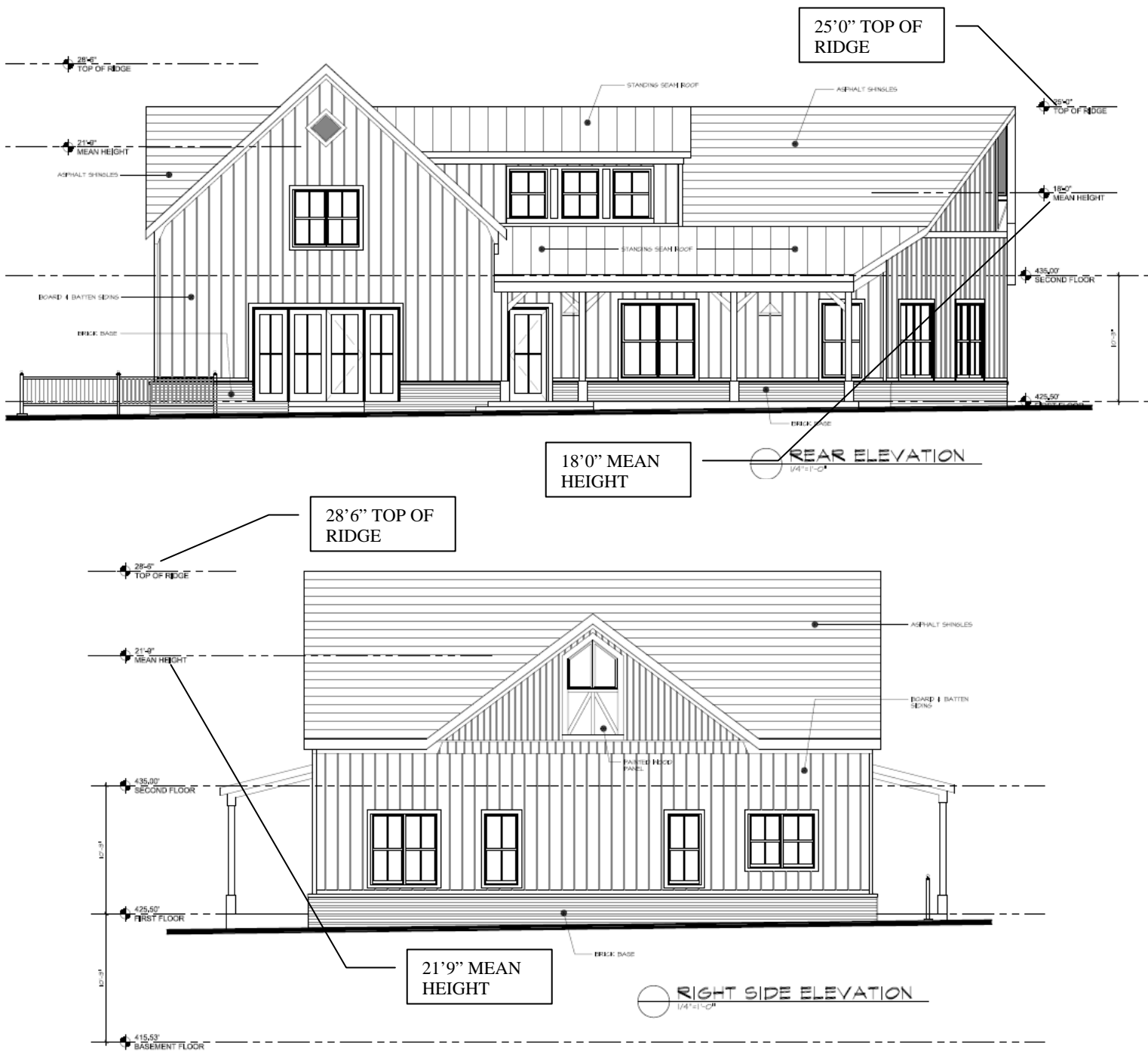
	2005 Site Plan, Ex. 60(a)	Current Site Plan, Ex. 94(a)	Reduction in Size	Percentage Reduction
Main Building Only	6,625 sq. ft.	5,762 sq. ft.	863 sq. ft.	13 percent
All Buildings	7,250 sq. ft.	5,762 sq. ft.	1,488 sq. ft.	21 percent

Dr. Dechter's original desire was to replicate, in the proposed building, the Maryland farmhouse style of the residence that was formerly located on the site. This is reflected in the overall design, including the choice of materials, the windows and the use of porches. The current plans retain many of the architectural elements associated with a farmhouse, but with the reduced size, changed building configuration, smaller porches, and changes in many of the windows and doors, the building has some of the flavor of a farmhouse without actually looking like one. Importantly, the upper roof line and architectural features along Weller Road have changed significantly, with the result that the Weller Road elevation no longer looks like a barn. In addition, the three separate roof lines along Georgia Avenue have been unified into a single main roof line, with a higher, peaked section on the residential side. These changes have removed the disjointed appearance of the earlier proposal.

Dr. Dechter's architect, Allen Neyman, opined that the proposed building would have a distinctly residential appearance, designed to fit into the neighborhood. He stated that except for neighborhoods that were created with a specific architectural style, most neighborhoods in Montgomery County, including the neighborhood of the subject site, do not have a defined architectural style. Tr. Aug. 2006 at 120. The building proposed here would have many obvious residential elements: sloped roofs, doubles-hung windows, brick and siding, asphalt shingle roofing – all elements that Mr. Neyman contends can be found on 98 percent of the houses in the neighborhood. He also stated that the building was designed with a “house structure,” because of its scale and to give it some identity. In Mr. Neyman's view, no element of the proposed building would create the impression of an institutional or commercial structure. Dr. Dechter wanted a friendly-looking, whimsical building, and that is what they have designed. *Id.* at 123.

Building elevations from Exhibit 77(c) are reproduced on the next two pages.





Mr. Neyman explained the basis for his opinion that the proposed building would be compatible with the surrounding neighborhood. He acknowledged that the proposed building would be larger than many of the nearby houses, but noted that it would be quite a bit smaller than many of the buildings along Georgia Avenue, including the Glenmont United Methodist Church to the north, the Assembly of God Church to the south, the townhouse blocks of the adjacent Windsor Square

community, the Glenmont Heights apartment buildings across Georgia Avenue, and the Glenmont Shopping Center. The adjacent townhouses, for example, are taller than the proposed building. Most of the townhouse buildings are also much larger than the proposed building, roughly 120 feet long. The smallest of them, which fronts on Georgia Avenue, measures about 70 feet by 35 ft, which is very similar in mass to the building proposed here.

Mr. Neyman described Georgia Avenue at this location as a “high speed, high volume collector road . . . that has radically . . . changed the future of this neighborhood . . . and will continue to have the effect of transitioning all of the uses along this edge or this border from now into the future.” Tr. August 30 at 124-25. Mr. Neyman described the transition of Georgia Avenue as part of the nature of urban development. He argued that the special exception should be approved to allow a vital health service to continue to be provided to the neighborhood, in a new, state-of-the-art facility. Mr. Neyman stated that the current trend in development is people wanting to live, work, shop and worship in the same neighborhood, so they should be able to also get medical services in their neighborhood.

Technical Staff stated that there are no buildings in the area of the subject site that are similar in design to the building proposed here. Accordingly, Staff opines that the proposed building “would not be blending with the prevailing character of the residential neighborhood in terms of architectural design and size.” 2006 Staff Report at 21. Technical Staff opined that the scale and scope of the proposed building would be “more appropriate in a commercially zoned area than in a residential zone where it is competing for land that could be more appropriately allocated for residential uses.” 2006 Staff Report at 17. Staff does not contest the evidence that a modern dental office requires more space than in years past, but opines that “if modern day dentistry demands a facility that would not blend with the prevailing residential character of the neighborhood, such a facility should be located outside of a residential neighborhood” *Id.* at 17. Staff describes the smaller size of the current building proposal as “slight reduction,” but the Hearing Examiner notes that this conclusion is based on continuing use of the incorrect figure of 6,317 square feet for the main building as originally proposed. See 2006 Staff Report at 18-19. As explained earlier, the main building as originally

proposed contained 6,625 square feet. By using the incorrect figure from the 2005 Site Plan, Staff effectively cuts the size of the reduction in half. This is significant, given that much of Staff's objection to the proposed building is based on its size.

Despite opining that proposed building would not be in harmony with the neighborhood, Technical Staff continues to recommend approval of the petition. This is based on Staff's recognition that although the building would not blend in with the neighborhood, the site is substantially larger than nearby residential properties and is located at the intersection of two roads, one of which is a major arterial, and across from a church with a large parking facility. Staff finds that these factors, coupled with landscaping, setbacks, and parking lot screening, help "to soften and counterbalance the effect from the scale and bulk of the proposed development." 2006 Staff Report at 21. Moreover, Staff notes that the proposed building is within the building size limits that would apply to the site under the R-90 Zone, if the site were used exclusively for residential purposes. Staff observes, in addition, that the site was most recently the location of neglected and dilapidated dwellings that made the property unattractive and subject to undesirable activities. Thus, Staff finds that the proposed development "would have a positive impact on existing and future development of properties in the neighborhood." 2006 Staff Report at 22.

The final conclusion of the Staff Report states that although the present plans represent a notable improvement over the original proposal, Staff "remains convinced that the size, scale and scope of the proposed building and use are beyond what was anticipated by the specific requirements of the ordinance." 2006 Staff Report at 25. Staff recommends approval, nonetheless, finding that "the lack of specificity and clarity in the current standards and requirements of the ordinance make it possible for the application to meet the requirements of the ordinance provided that the recommended conditions are met." *Id.*

The Hearing Examiner notes that the Petitioner cannot meet one of Staff's recommended conditions of approval – a limit of three staff members (other than dentists) on site at one time. It is clear from the Staff Report that this limitation is based on the number of parking spaces

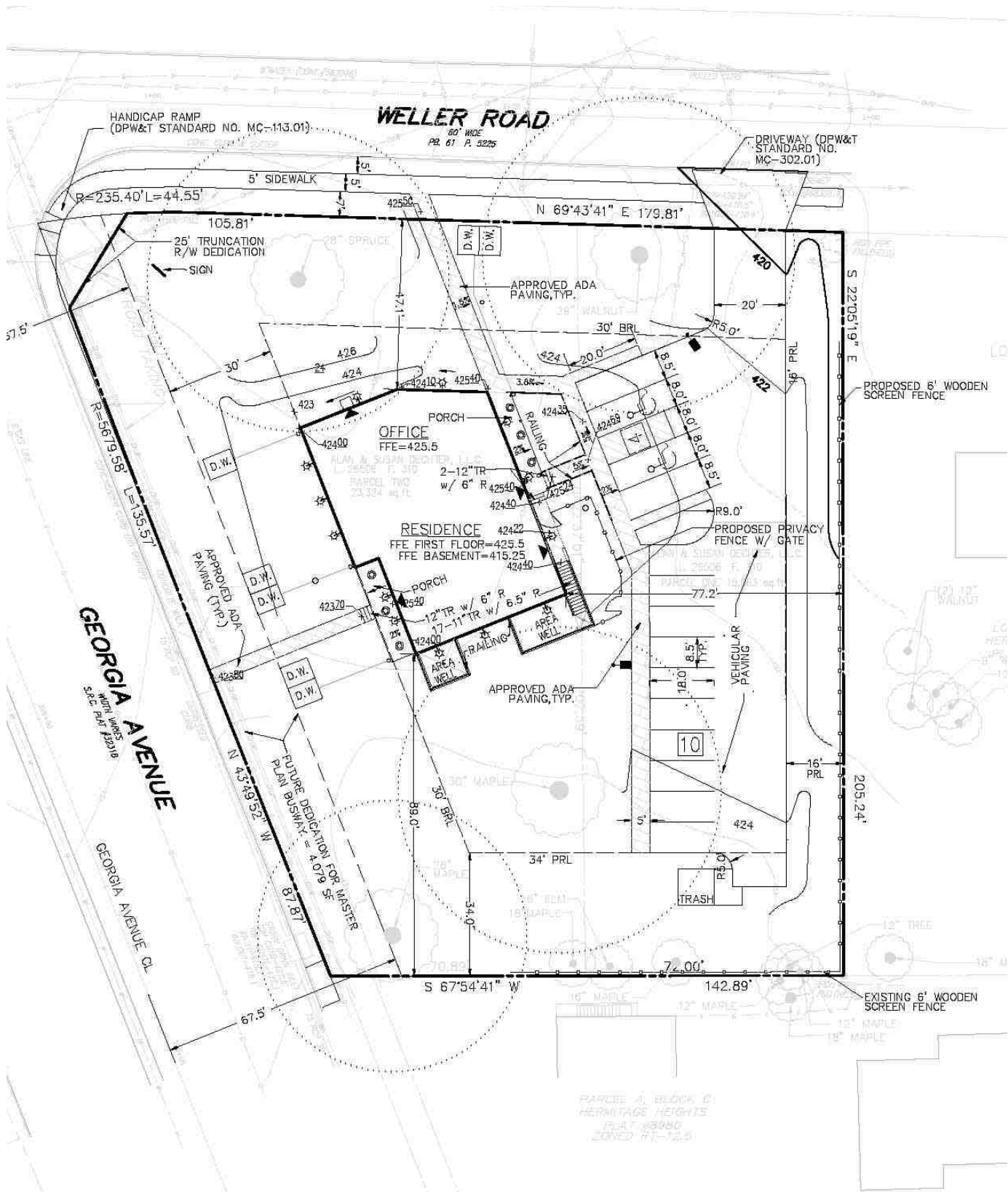
available. Dr. Dechter testified that with two dentists, the office would need a minimum of six staff members: two receptionists, two hygienists and two dental assistants. It is worth noting that the latest site plan that Technical Staff reviewed identified two parking spaces as handicapped-accessible. The current site plan identifies only one parking space as handicapped-accessible; Dr. Dechter made this change based on testimony during the remand hearing that the Americans with Disabilities Act (“ADA”) requires only one handicapped-accessible space for this use. This change makes an additional space available for general use.

Technical Staff’s recommended conditions of approval include increasing the number of parking spaces from 12 to 14. The 2005 Site Plan provided for 11 surface parking spaces and three garage spaces. The Petitioner reduced the total number of spaces to 12 in an effort to respond to the Board’s concern, articulated in its Opinion, that the proposed two-lane driveway and surface parking lot would tend to have an “overtly commercial scale and appearance.” Ex. 73 at 9. The Petitioner believes that 12 parking spaces would be sufficient, but would be willing to provide 14 spaces, as recommended by Technical Staff, if so directed by the Board. The Petitioner submitted the alternative site plan on the next page to demonstrate that two additional parking spaces can be accommodated, near the main office entrance, with very little impact on the footprint of the parking facility. (It should be noted that this alternative, which was prepared before the remand hearing, identifies two parking spaces as marked for handicapped use. This would need to be changed to one if the Board were to approve the use and require 14 spaces.)

2. Proposed Operations

Dr. Dechter intends to relocate his existing dental practice to the new building, if the special exception is granted. He anticipates that his existing medical office special exception would then be transferred to another medical professional, such as a pediatrician, a psychologist, or a pediatric dentist, assuming that the Board approves such a transfer.

Alternative Site Plan with 14 Parking Spaces, Graphics Only. Ex. 85

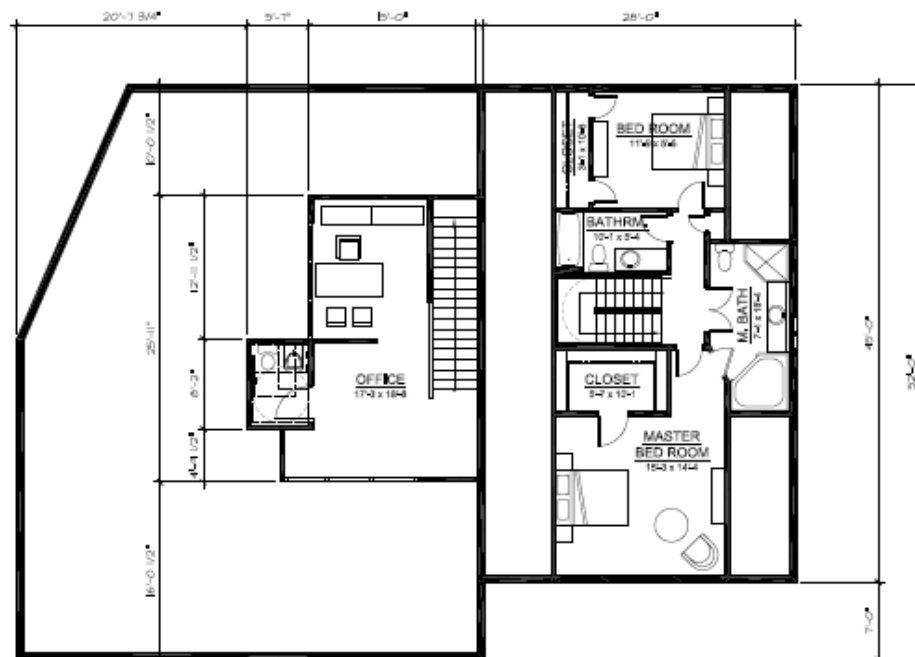
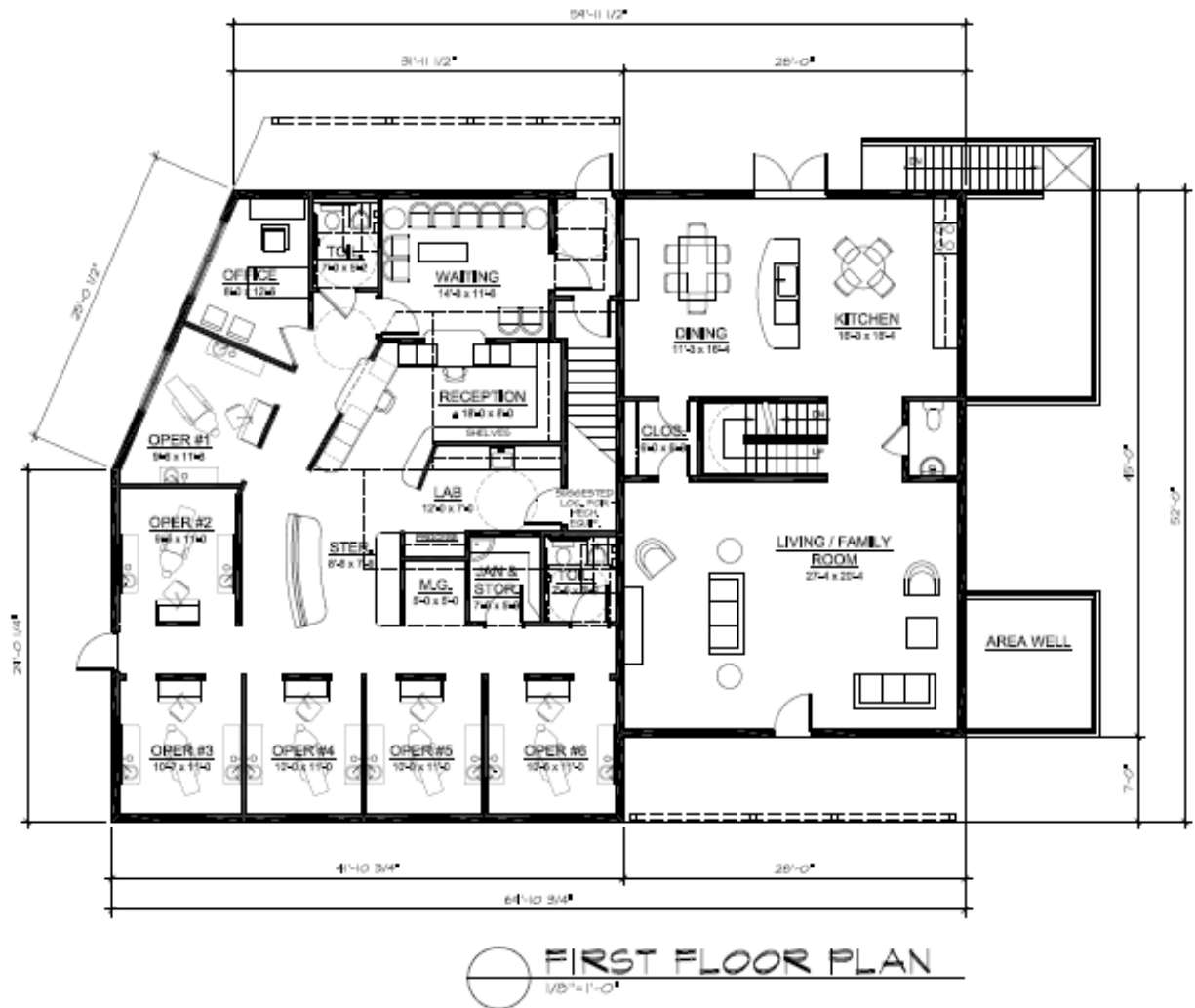


The hours of operation for the new dental clinic would be Monday through Friday, 7:45 a.m. to 6:00 p.m., plus Tuesday evenings until 7:00 p.m. and Saturdays, 8:00 a.m. to 1:00 p.m. The practice would be limited to two dentists, including Dr. Dechter. Additional staff would consist of no more than nine part-time employees (the equivalent of 4.5 full-time staff), including dental assistants and office staff, with a maximum of six employees (other than dentists) on site at one time. Dr. Dechter testified that a modern dental practice with two dentists requires at least six support staff on site at one time: two people in the front office, two hygienists, and two dental assistants. He noted that most of the employees work part-time. Some work two or three days a week. Some work in the morning and leave when the office closes for lunch at 1:00, and others start at the end of the lunch hour, at 2:00 p.m. These varying schedules result in a minimum of parking overlap. Tr. Aug. 2006 at 151-54.

The proposed conditions of approval would limit patient appointments to a maximum of five during any one hour and 55 per full working day, exclusive of emergency patients.⁶ Dr. Dechter testified that he has about four to five emergency patients per day. Addressing the change from 80 patients per day to 55, Dr. Dechter stated that he has had a change in philosophy during the course of this case. Between the first hearing and the remand hearing, his hygiene schedule has increased from 45 minutes to one hour per patient, out of a desire to be more comprehensive. As he put it, he wants to be a better dentist, and that doesn't mean he will have four times as many patients or three times the staff, but he can't provide the quality of care he seeks to without the new facility.

Dr. Dechter and Mr. Neyman both explained the space requirements of a modern dental office, which are driven by several factors: modern dental technology, which requires more space for sterilization equipment and other new technologies; federal privacy regulations, which require space for private records storage and patient consultations; the ADA, which requires larger spaces throughout the facility; and the increased complexity of insurance coverage and billing, which require an area separate from the waiting room for staff to discuss financial issues with patients. These features may be seen on the floor plans that follow.

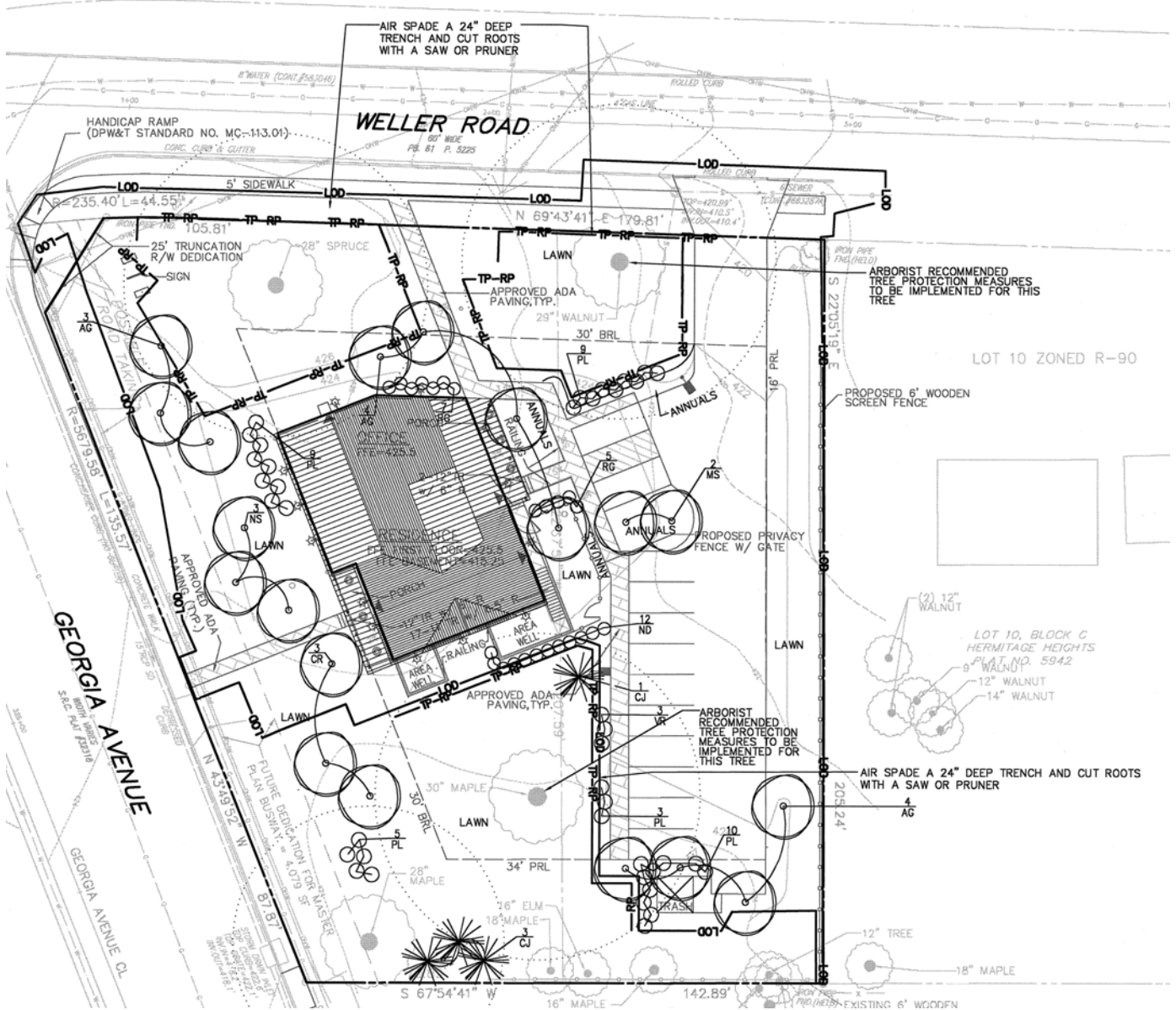
⁶ This represents a reduction of roughly one-third from the 80 patients per day requested in the 2005 proceedings.



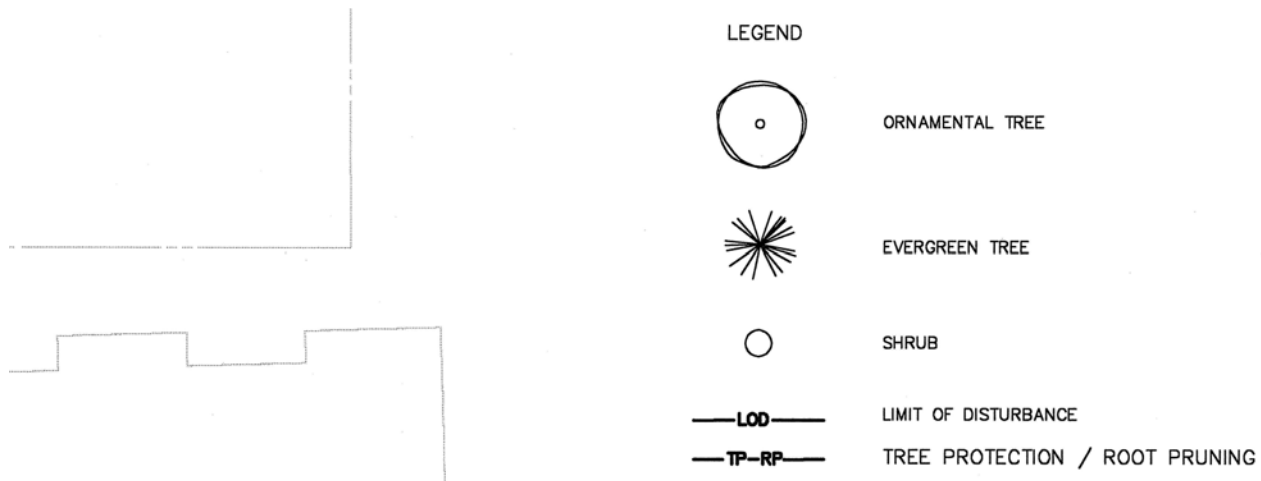
E. Landscaping, Lighting and Signage

The submitted landscape plan, shown on the next two pages, proposes extensive landscaping and screening, including six-foot wooden fencing along the eastern and southern property lines, 19 ornamental trees, four evergreen trees, and a large number of shrubs and annuals.

Landscape Plan Graphics, from Ex. 92(b)



Landscape Plan Legend, from Ex. 92(b)



Landscape Plan Key, from Ex. 92(b)
(Due to space constraints, the key has been divided in the middle)

KEY	QUANTITY	BOTANICAL NAME
ORNAMENTAL TREES		
AG	11	Amelanchier grandiflora 'Autumn Brilliance'
CR	3	Cornus Rutdan 'Celestial'
MS	2	Malus x 'Sugar Tyme'
NS	3	Nyssa sylvatica
EVERGREEN TREES		
CJ	4	Cryptomeria japonica
SHRUBS		
ND	12	Nandina domestica
PL	36	Prunus laurocerasus 'Otto Luyken'
RG	12	Rhododendron 'Girard's Pleasant White'
VR	3	Viburnum rhytidiphyloides
ANNUALS		
As shown	T.B.D.	T.B.D.

COMMON NAME	SIZE	ROOT BALL	COMMENT
Autumn Brilliance' Serviceberry	8'-10'	B & B	Multi-stem (3 to 5 stems)
Flowering Dogwood	2 - 2 1/2" Cal.	B & B	Full
Sugar Tyme Crabapple	3 1/2" cal.	B & B	Heavy, full-branching, symmetrical
Black Gum	3 1/2" cal.	B & B	Full, symmetrical
Japanese cryptomeria	8'-10'	B & B	Heavy, full-branching, symmetrical
Heavenly Bamboo	5 gal.	container	Heavy, uniform, full to ground
'Otto Luyken' Cherry Laurel	24"- 30" ht.	B&B	Heavy, uniform, full to ground
White Girard's Azalea (evergreen)	5 gal.	container	Uniform, full
Leatherleaf viburnum	24"- 30" ht.	B&B	Heavy, uniform, full to ground
T.B.D.	T.B.D.	T.B.D.	T.B.D.

One of the challenges of this site is the need to preserve existing specimen trees. Technical Staff identified two, in particular, that will required a final tree save plan if the special exception is approved: a 29" Walnut that stands near Weller Road, adjacent to the proposed driveway location; and a 30" Maple in the southern portion of the site. Based on the smaller building footprint on the current site plan, Mr. Landfair expects that the Petitioner would also be able to save a third specimen tree, a 28-inch spruce near the corner of Georgia Avenue and Weller Road. Measures planned to save these trees include root pruning several weeks before grading begins, to reduce the shock the trees experience during grading, and the use of tree protection fences during construction. In addition, minor changes could be made during later review stages to reduce encroachment on the critical root zones. Such changes might include a slight shift in the parking area, realignment of walkways, or "suspending" the porches so they don't touch the ground.

Technical Staff reports that the petition has an approved Natural Resources Inventory/Forest Stand Delineation, and is exempt from forest conservation requirements.

Proposed exterior lighting consists of two 14-foot pole lights in the parking lot, six down-lights on the front and rear porches and 13 wall-mounted lights. The submitted lighting distribution plan, Exhibit 92(c), demonstrates that the level of illumination would drop to zero well before reaching the property lines to the north (Weller Road), south (townhouses) and west (Georgia Avenue). To the east, along the parking lot, the level of illumination along the property line would vary from zero to 0.1 foot-candles. Dr. Dechter agreed to a condition that would require the pole lights to be turned off 30 minutes after the end of operating hours. Tr. June 2005 at 59. Technical Staff opined that the proposed use would be unlikely to cause objectionable illumination or glare.

The Petitioner proposes to install a sign near the corner of Georgia Avenue and Weller Road, as shown on the site plan. The Petitioner's counsel proffered that the sign would be approximately the same size as the sign at Dr. Dechter's current location, about three feet off the ground and two feet square, with ground-level illumination that goes on from 4:00 pm to 10:00 pm. See

Tr. at 49-50. Dr. Dechter's current sign is shown below. The lighting distribution plan shows that the illumination from the sign would drop to zero before reaching the property lines. See Ex. 92(c).



F. Transportation

A final evaluation of Adequate Public Facilities requirements would be performed during subdivision review, but Transportation Planning Staff at the MNCPPC provided an initial review for purposes of this petition. Staff's comments and Petitioner's evidence are summarized below.

1. Access and Parking

Staff notes that the vehicular access point would be on Weller Road, set back as far as possible from the Georgia Avenue intersection. Transportation Staff finds the design of the driveway to be adequate. See 2006 Staff Report at 6. Transportation Staff notes that public transit is available at the Glenmont Metro Station, approximately 2,400 feet from the site, and via six bus routes to the Metro station.

The submitted site plan, Exhibit 94(a), proposes 12 on-site parking spaces, one of which would be designated, by striping and signage, for the exclusive use of persons with disabilities. Technical Staff recommends increasing the number of parking spaces from 12 to 14. The Petitioner believes that 12 parking spaces would be sufficient, but would be willing to provide 14 spaces, if so directed by the Board. The 2005 Site Plan provided for 11 surface parking spaces and three garage

spaces. The Petitioner reduced the total number of spaces to 12 in an effort to respond to the Board's concern, articulated in its Opinion, that the proposed two-lane driveway and surface parking lot would tend to have an "overtly commercial scale and appearance." Ex. 73 at 9. Petitioner submitted an alternative site plan, shown on page 30, which demonstrates that two parking spaces could be added, near the main office entrance, with only a very modest increase in the footprint of the parking lot, and virtually no increase in its visibility.

As discussed further in Part IV, the Hearing Examiner considers the proposed parking lot to be an inherent characteristic of a medical practitioner's office, and finds it preferable to provide more parking rather than less, given that increasing the size of the parking lot slightly would have no appreciable effect on its visual impact and would reduce the likelihood of on-street parking. For all of these reasons, the conditions of approval recommended at the close of this report require the Petitioner to submit a new site plan with 14 parking spaces. (The additional parking spaces have no impact on the number, type or location of lighting fixtures, or on proposed landscaping, so the Hearing Examiner sees no need for a new landscape plan or lighting plan.)

Transportation Planning Staff notes that the Zoning Ordinance requires a medical office to have at least four parking spaces for each medical practitioner. See 2006 Staff Report at 10; Code § 59-E-3.7 (Page 59E-29). Two spaces are required for a residence, per Technical Staff and Section 59-E-3.7. See *id.* at 9; Code § 59-E-3.7 (Page 59E-26). Thus, with 12 spaces, the proposed special exception would have two spaces more than the Zoning Ordinance requires, and with 14 spaces it would have four more than required.

Based on the limitations on the number of employees and patients to which the Petitioner has agreed, the maximum parking utilization can be summarized thus:

Type of User	Maximum Number on Site at One Time
Dentists	2
Staff	6
Patients	5 (based on maximum of five scheduled appointments in any one hour)
Residents	2 (based on Transportation Staff's recommendation that two spaces are typically necessary for a residential dwelling)
Total	15

As the table above indicates, even with 14 parking spaces, the proposed operation might result in a small amount of parking on Weller Road during the business hours of the dental office. On-street parking could be expected during periods when both dentists and six staff members are on site, *if* five patients need parking spaces at the same time *and* residents of the building or their guests are occupying two spaces, or a resident is occupying one space and none of the other vehicles seeking parking are eligible to use the handicapped-accessible space.

Dr. Dechter feels that 14 parking spaces would be enough, considering the proximity of the site to Metro. Dr. Dechter acknowledged that he cannot guarantee he will always have at least one employee who walks to work, but he testified that during his long experience in hiring people at his current location across the street (over 20 years), there is a large population of area residents who can take the jobs he offers, and in practice, he generally has one or two people on staff who live in the neighborhood and walk to work. In addition, as Transportation Staff recognized, some patients arrive on foot or by public transit, and a single vehicle may bring more than one patient to the site, particularly if they are members of the same family.

Dr. Dechter and other witnesses testified that on-street parking is not prohibited on Weller Road west of Georgia Avenue and typically is available, given that the nearby homes have off-street parking. Dr. Dechter suggested that on-street parking may be crowded during Sunday morning church services, but his office would be closed on Sundays. Technical Staff states that parking is prohibited on Weller Road, west of Georgia Avenue, within 50 feet of Georgia Avenue on the north side of Weller Road and within 60 feet of Georgia Avenue on the south side. Dr. Dechter testified that presently, the Weller Road frontage of the subject site is filled with cars all day during the week, due to Metro commuters trying to avoid paying a parking fee at the Metro lot. He stated that he organized the neighbors at his current location to lobby for parking restrictions on Weller Road east of Georgia Avenue, which has stopped the problem of commuter parking (non-residents may park on Weller Road, east of Georgia Avenue, for only two hours at a time). If the subject special exception is granted, Dr.

Dechter plans to organize a similar lobbying effort to put parking restrictions in place on Weller Road west of Georgia Avenue.

Dr. Dechter argues that occasional, short-term parking on Weller Road by his patients would not have a detrimental effect on the neighborhood, particularly since there is room for several cars along the property frontage. Mr. Landfair estimated that four cars could park safely along the property's Weller Road frontage. Tr. Aug. 30 at 160-62. Four cars would fill approximately half of the property's 180-foot frontage⁷, stopping well short of the point where Technical Staff indicates parking is prohibited. Mr. Landfair suggested that four more vehicles could park safely on the north side of Weller Road, across from the site. This also appears to be consistent with the parking restrictions reported by Technical Staff.

Petitioner tried two means of adding to the number of spaces available for the dental use, both of which have been rejected by Technical Staff and the Hearing Examiner. First, following the first hearing, Dr. Dechter obtained a letter from the Glenmont United Methodist Church, which has a very large parking lot across Weller Road from the site, stating that Dr. Dechter could use the church's parking lot for overflow parking. See Ex. 51(d). Technical Staff found this letter inadequate, because it does not constitute a binding agreement or covenant dedicating a specified number of parking spaces for use by the dental clinic. See Ex. 61. The Hearing Examiner finds the letter troubling because of its final paragraph, which states that Dr. Dechter "has generously offered the use of his parking spaces any time [the church is] short of parking." Ex. 51(d).

While it is a gracious gesture for Dr. Dechter to offer the use of his parking lot in exchange for use of the church's lot, the Hearing Examiner questions whether a special exception applicant is in a position to exercise such generosity. The analysis of parking adequacy and neighborhood impacts that has been carried out during these proceedings did not include the impact on the immediate neighbors of the proposed parking lot becoming annex parking for a very large church.

⁷ The 180-foot figure appears to be "usable" frontage. It excludes the area intended for dedication to truncate the corner, and the 15 feet immediately east of the driveway. Per Technical Staff, the full property frontage is approximately 224 feet.

This additional usage could make Sundays, which should be a day without special exception activity at the subject site, a time of high parking lot usage, with attendant noise and fumes. Likewise, weekday evenings, which should be free of special exception activity (except for Tuesdays until 7:00 p.m.), could become periods of active parking lot usage – perhaps making it impossible for Petitioner to stick to his agreement to turn off the parking lot lights 30 minutes after his office closes at night.

The Hearing Examiner finds Dr. Dechter's offer to make his proposed parking lot available to the nearby church to be inappropriate in the context of a special exception abutting residential uses. The neighbors abutting the subject site – especially residents of the single-family home to the east, which would be separated from the parking lot only by a privacy fence and a stand of bamboo – are entitled to have the periods of intense activity limited to the operating hours for the dental office. Accordingly, the Hearing Examiner recommends that if the special exception is granted, Dr. Dechter should be required to explain to the church, in writing, that he cannot offer them the use of his parking lot.

Petitioner's second additional means of increasing the number of parking spaces available for the dental clinic was to propose that the residential use be limited to a single tenant and a single vehicle. Transportation Staff rejects this suggestion, and the Hearing Examiner agrees. As a threshold matter, a limit of one tenant would be difficult to enforce. Moreover, as Staff points out, even a single resident should typically have two parking spaces available for their and their visitors' use, even during hours when the dental practice is open. Residents may be out of the house working during typical business hours, but they could equally well work at home, work non-traditional hours, or not work at all.

The People's Counsel, Martin Klauber, raised a concern during the first hearing that 14 parking spaces may not be enough, and could lead to overflow parking on Weller Road. Mr. Klauber suggested a condition of approval requiring Dr. Dechter to submit an annual parking utilization report that would track parking usage and overflow parking. As an alternative, Dr. Dechter agreed to seek

permission from the church across the street to use the church parking lot when space is available. As noted above, that permission was obtained, but is problematic.

As an alternative to an annual report which, if done with any real degree of accuracy, would impose considerable administrative burdens, the recommended conditions of approval provide for the Board to retain jurisdiction to impose additional conditions on the special exception if future evidence concerning parking so warrants. This would make it a simple matter for the Board to take action if complaints were received from neighbors in the future.

2. Sidewalks and Roadway Dedications

Per Technical Staff's recommendations, the site plan provides for four-foot-wide lead-in sidewalks from both roadways to the dental office, plus a new five-foot sidewalk along Weller Road, consistent with the Sector Plan. See 2006 Staff Report at 7.

The conditions of approval recommended by Technical Staff and the Planning Board include a requirement that Petitioner provide for right-of-way dedication, at subdivision review, to allow for (1) a 25-foot truncation of the right-of-way at the corner of Georgia Avenue and Weller Road; and (2) a total of 67.5 feet of right-of-way from the centerline of Georgia Avenue, in accordance with the Sector Plan. Technical Staff finds that these dedications are provided for appropriately on the submitted site plan. See 2006 Staff Report at 7.

3. Vehicular Traffic

Petitioner submitted a traffic statement that was prepared by Mr. Berman, who is not a transportation expert, but worked with Dr. Dechter and Transportation Staff to devise an appropriate methodology. Relevant trip generation rates were not available from either the Planning Board guidelines or the Institute of Transportation Engineers, so Mr. Berman developed a trip generation rate based on information from Dr. Dechter about his current practice and the number of vehicle trips it generates. Using this trip generation rate, Mr. Berman extrapolated from the current practice, which he described as one and a quarter dentists (Dr. Dechter has a second dentist on staff, but due to space

constraints he functions mainly as a hygienist), to the proposed practice with two dentists. The resulting estimates are presented in the table below.

Petitioner's Estimated Trip Generation, from Ex. 24(g)

Site Elements	Existing	Proposed
Residential Dwelling	1	1
Staff		
Dentists	1.25	2
Medical Assistants	4	2.5 full-time equivalents
Office Staff	2+ part time 1	2 full-time equivalents
Total	7.25	6.5 full-time equivalents
Trips		
During AM Peak Period	28	28
During PM Peak Period	23	28
Parking	5	12
Space		
Office (sq. ft.)	1,050	2,426
Residential (sq. ft.)	1,050	3,336

Petitioner's traffic statement indicates that Dr. Dechter expects to have approximately 10 patients during the weekday morning peak hour, and 7 during the evening peak hour. In keeping with the recommendations made by Transportation Staff, the Petitioner has agreed to reduce that number by limiting the dental office to no more than five scheduled appointments during any one hour. Due to the site's proximity to Metro and a significant percentage of patients who live in the neighborhood, Petitioner expects some patients to either use transit or walk. No reductions have been made to the trip generation estimate, however, to reflect this.

Petitioner maintains that the proposed office would have minimal traffic impact on the community. He notes that vehicular access would be from Weller Road, and the existing curb cut on Georgia Avenue would be eliminated to provide for the bus way recommended in the Sector Plan. In addition, the new Weller Road curb cut would be approximately across the street from the driveway for Glenmont United Methodist Church.

Transportation Staff at the MNCPPC worked with Mr. Berman to establish appropriate traffic-generation rates, and accepted the final traffic statement as submitted. Because the proposed

use is expected to generate fewer than 30 peak-hour vehicular trips, a traffic study was not required to satisfy Local Area Transportation Review ("LATR") requirements.

Transportation Staff recommends the following limitations on staffing and patient appointments (see Transportation Staff Memorandum dated August 22, 2006 ("2006 Transportation Memo"), attached to 2006 Staff Report):

- Up to two full-time dentists on site at any one time.
- Up to three full-time or part-time dental assistants or office staff persons on the site at any one time.
- Up to five scheduled patient appointments per hour.

These recommendations appear to be based on the 12 parking spaces shown on the submitted site plan, which would accommodate two dentists, three staff and five patients, while leaving two spaces available for the residential use. See 2006 Staff Report at 10. Technical Staff added a recommendation that the number of parking spaces be increased to 14, with 12 spaces dedicated for the exclusive use of staff and patients of the dental office. See 2006 Staff Report at 2. This recommendation was not accompanied, however, by any change in the limitations on the number of staff and patients that Transportation Staff had recommended with 12 parking spaces.

Transportation Staff concluded that with its recommended conditions, the proposed use would satisfy LATR and would have no adverse effect on nearby road conditions or pedestrian facilities. Transportation Memo at 2. As noted earlier, the Petitioner cannot operate with only three staff members on site at one time; Dr. Dechter testified that two dentists require the support of six staff members. It is evident from the discussion in the Staff Report that the recommended limitation of three staff members at one time is related to parking, not to trip generation. Moreover, Mr. Berman's trip generation estimates include eight staff arrivals during the three-hour morning peak period, which reflects the full number of staff Dr. Dechter proposes, not the three staff members suggested by Transportation Staff. Thus, the Petitioner's inability to accept the recommended condition of three staff members on site at one time does not, in the Hearing Examiner's view, undercut Transportation Staff's conclusion that the proposed use would have no adverse impact on area roadway conditions. It does affect the adequacy of the parking lot, as discussed in Part II. F.1. above, but that impact would be

mitigated to a great degree by increasing the number of parking spaces to 14 and reducing the number of handicapped-designated parking spaces to one.

G. Development Standards

The table on the next page, adapted from a table provided in the Staff Report, compares the development standards for the R-90 Zone with the development proposed for the subject property.

Compliance of Building with Development Standards

Development Standard	Required/ Allowed	Proposed
Minimum Lot Area	9,000 sq.ft.	38,837 sq. ft.
Minimum lot width		Georgia Ave. Weller Rd.
At front building line	75 ft.	226 ft. 213 ft.
At street line	25 ft.	223 ft. 224 ft.
Minimum Yard Requirements for Main Building:		
From any street line	30 ft.	30 ft. from Georgia Avenue 47 feet from Weller Road
From side lot line		
One side	8 ft.	89 feet from south property line
Sum of both sides	25 ft.	--
From rear lot line	25 ft. ⁸	77 ft. from east property line
Maximum building height	35 ft. or 2 ½ stories	18 ft. (residence) 25 ft. (office)
Maximum building coverage	30%	16%

For a corner lot, both street frontages are treated as front yards, and for analysis purposes one of the remaining sides is designated the rear and the other is designated the side. In this case, Technical Staff treated the eastern property line (adjacent to single-family home) as the rear and the southern property line (adjacent to townhouses) as the side. The building would satisfy the development standards either way. The parking facility, however, satisfies applicable standards only if the southern property line is considered the rear. Technical Staff did not analyze the compliance of the parking lot with the requirements of Section 59--E-2.83, but the Hearing Examiner finds, as shown in the table below, that these requirements would be satisfied.

⁸ The Staff Report identifies this requirement as 30 feet, but § 59-C-1.323(b) shows it as 25 feet.

Compliance of Parking Facility with Development Standards

Development Standard	Required/ Allowed	Proposed
Minimum Setback from Street Georgia Avenue Weller Road	30 ft. 30 ft.	Approx. 95 ft. Approx. 40 ft. (34 ft. with 14 parking spaces)
Minimum Side Yard Setback	16 ft.	16 ft.
Minimum Rear Yard Setback	25 ft.	34 ft. from south property line
Screening	6 ft. high, 3ft. on streets	Six-foot fencing to south and east, extensive landscaping facing streets.
Minimum Number of Parking Spaces Residential Dental Office Total	2 <u>8</u> 10	2 <u>10 or 12</u> 12 or 14

H. Community Support

The record contains letters of support from the Windsor Square Condominium Association, representing the townhouse community adjacent to the subject site to the south; Glenmont United Methodist Church, confronting across Weller Road; and First Assembly of God Church, about two blocks south of the subject property on the same side of Georgia Avenue.

The Windsor Square letter, dated May 10, 2004, endorses Dr. Dechter's plans "to build a modern dental facility, in an architectural style that will blend in with its surroundings, across Georgia Avenue from your current offices and next to Windsor Square." Ex. 11(a). The letter describes the deterioration of the site before Dr. Dechter became the owner, including a collection of non-operational vehicles so unsightly that Windsor Square formally complained to Montgomery County and testified against the owner in court. The letter voices the opinion that Dr. Dechter's planned facility "will be a definite improvement to the Glenmont Section of the Georgia Avenue Corridor." *Id.*

Glenmont United Methodist Church submitted two letters, one before the first hearing and one after, when the record was reopened to allow revised submissions. The first letter states that the church has been kept apprised of all site developments, and that members "appear eager to see an attractive building gracing the lot adjacent to our church," with a modern dental practice that will

enhance the community's overall health. Ex. 23. The second letter states that the church has no objections to the additional evidence submitted (a revised set of plans and staffing information). See Ex. 63.

In his letter, the Pastor of the First Assembly of God Church voices his support, stating that the proposed building has "the same architectural design" as both his church and the nearby Methodist Church. See Ex. 24(i).

The record also contains letters of support from or on behalf of seven of Dr. Dechter's patients, several of whom are mentally or physically handicapped to some degree. See Exs. 11(b)-(e); 47; 88. Each of the letters praises Dr. Dechter's dental care and expresses support for his effort to build a larger, more modern facility with greater accessibility. One of the letters, written on January 22, 2004, is from patient Harold T. Peterson, Jr., a 31-year resident of Weller Road, who states that one of his primary reasons for supporting Dr. Dechter is that "the house he intends to tear down has been subject to periods of neglect by owners and tenants . . . and . . . has detracted from the neighborhood." See Ex. 11(d). The most recent letter, written in July 2006, expresses dismay at the "bureaucratic quagmire" that has prevented Dr. Dechter from opening a new, more accessible dental facility on the subject site. See Ex. 88. The writer, Douglas W. Jesch, expresses the hope that "the person that reads this could find a way to raise their spirit of community service and caring for others by doing whatever they can possibly do to expedite the approval process for the zoning of Dr. Dechter's new office." Ex. 88.

III. SUMMARY OF HEARING

The remand hearing conducted on August 30, 2006 is summarized below. For a summary of the original hearing in this case, see the Hearing Examiner's Report and Recommendation of October 21, 2005.

A. Petitioner's Case in Chief

1. Bill Landfair, land planner. Tr. Aug. 2006 at 17-104; 166-67.

Mr. Landfair was designated an expert in land planning and zoning. He described the subject property and its location, noting that the surrounding area is predominantly residential in character. Mr. Landfair confirmed that he testified at the original hearing in this case that the site plan proposed at that time conformed to the general and special conditions for the special exception, and that it was compatible with adjacent properties and conformed to the Master Plan. Mr. Landfair also confirmed that the Hearing Examiner, the Planning Board and Technical Staff all recommended approval of the original application, which the Board denied.

Mr. Landfair testified that in denying the application as originally presented to it, the Board raised concerns about non-inherent adverse effects that they identified, including the freestanding garage. He noted that the Board was concerned about the intensity and scale of the operation, which, at that time, proposed 80 patients per day, and about the location of the driveway and the scale and size of the proposed building. Mr. Landfair reported that the Board found the proposed use was not compatible or in harmony with the area because of the size, scale and design of the building, as well as the volume of patients, and was contrary to the master plan recommendation for the site. Mr. Landfair observed that following the reconsideration and remand of the application, the Petitioner proposed amended plans and operational characteristics that are designed to resolve the Board's objections.

Referring to a landscape/site plan, Mr. Landfair described the changes in the proposed plans. The building is shown roughly in the center of the property, oriented towards Georgia Avenue, with pedestrian path connections from sidewalks along Georgia Avenue and Weller Road. Parking is provided in the rear of the property, with access from Weller Road and screening provided by existing and proposed landscaping, as well as a proposed six-foot wooden fence along the rear, and an existing six-foot fence along the side. The Petitioner proposes a two-story building containing 5,762 square feet, and a parking lot with 12 spaces. However, in response to Technical Staff's concern about the

adequacy of parking, the Petitioner has presented an alternative site plan providing for 14 parking spaces. The additional spaces are shown near the building entrance, next to the handicapped-accessible parking space. Mr. Landfair opined that these spaces can be added within the existing grade, without any significant impact on the critical root zone of the nearby walnut tree. The change would put the parking lot 8 ½ feet closer to Weller Road, and would result in a slight adjustment in the green area calculation. Tr. Aug. 2006 at 31, 55-56.

Mr. Landfair stated that the overall building floor area has been reduced by 21 percent from the earlier submission (that figure compares the total floor area proposed earlier, including the internal garage and the free-standing garage, with the total floor area proposed on the current plan, which has no garage space). The current plan provides for 2,426 square feet of office area and 3,336 square feet of residential area. The building façade along Georgia Avenue has been reduced from 100 feet on the earlier plan to 70 feet. The mean building height has been reduced from 27 feet to 21 feet 9 inches. Tr. Aug. 2006 at 29. In addition, Mr. Landfair noted, porch extensions along the east side of the building have been removed. He described the parking area as more straightforward in design, noting that previously, the parking had to work around the internal garage entrance. Mr. Landfair noted that with the smaller building footprint, the building coverage is 10.6 percent of the site, and approximately 68 percent of the site consists of green area. He stated that the proposed landscaping is about the same, and will continue to screen the parking area from view.

Mr. Landfair stated that the fencing along the parking lot would obscure it from view from the adjacent lot. He opined that the changes to the proposed site plan make it more compatible with the neighborhood, in terms of scale and height, than the original design. He also noted that the architectural materials and many of the design elements are designed to contribute to the residential character of the building. Mr. Landfair described the single-family detached lots in the area as ranging from 10,000 to 20,000 square feet in size, which is roughly between one fourth and one half the size of the subject property. He estimated that the amount of green area proposed for the subject site is comparable to or greater than what is typically found on the single-family detached lots in the

neighborhood, and the building coverage as a percentage of the lot size is comparable. Relative to the homes along Weller Road, Mr. Landfair observed, the building frontages proposed for the subject site compare very favorably, as a percentage of the lot frontage. Moreover, even in absolute terms, some of the homes along Weller Road, which tend to be long ramblers, approach the 70-foot length of the proposed building on its long side, facing Georgia Avenue. Tr. Aug. 2006 at 37.

Mr. Landfair opined that from a planning perspective, it would be very inefficient to put a single, detached home on the subject property, at the size typically found in the neighborhood, because of the size of the lot. He suggested that a single home would stand out on this property, and would not be consistent with the smaller-lot development pattern in the general neighborhood. Tr. Aug. 2006 at 38.

Turning to lighting, Mr. Landfair stated that as shown on the photometric plan, there would be relatively low light levels and no spread of light beyond the property line. *Id.* He described the light fixtures as downlighting on the porch, plus two 14-foot pole lights in the parking lot. The Hearing Examiner questioned whether the lighting shown, which drops down to 0.2 foot-candles at the end of the parking lot farthest from Weller Road, would provide enough light for people to get to their cars safely. In response, Mr. Landfair stated his reliance on the lighting expert who prepared the photometric plan. Tr. Aug. 2006 at 39-40.

Mr. Landfair testified that the landscape plan relies on foundation plants, as well as ornamental trees, several evergreen trees and shrubs, and annual flowers. Most of the landscaping was concentrated around the building foundation and in the front yard, as well as along the edge of the parking area. With regard to the visibility of the parking lot from Georgia Avenue, Mr. Landfair stated that the parking lot would not be completely hidden by the landscaping, but "I don't think you are going to have your eye called to attention to the parking area. . . I think you are going to be focusing on the building itself, and the amount of landscaping that we are proposing, particularly within the front yard along Georgia Avenue." Tr. Aug. 2006 at 43. Mr. Landfair noted that one important change between

the earlier plan and the current one is that based on the current plan, one additional specimen tree would be saved (a 28-inch spruce near the corner).

With regard to the Sector Plan, Mr. Landfair opined that the proposed use would achieve the plan objectives to maintain and enhance the character of the existing residential neighborhood, and to establish pedestrian-friendly green boulevards along Georgia Avenue. He explained that the proposed development would enhance Georgia Avenue by replacing a vacant lot with a beautiful building surrounded by beautiful landscaping, particularly along the road frontages. He noted that the Petitioner proposes to create a five-foot sidewalk along the property's Weller Road frontage, where today there is no sidewalk at all. Mr. Landfair opined that placing the parking in front of the building would be inconsistent with the Sector Plan because that would make the parking clearly visible from both roads, and it would be all but impossible to mitigate the view of the cars and people coming and going. In addition, it would take up most of the landscaping area.

Mr. Landfair opined that the proposed use would also meet the Sector Plan objective to expand the range of housing choices for all income groups, by creating a very nice rental unit. The surrounding area currently has single-family detached homes, single-family attached homes and farther south, multi-family housing. The single rental unit proposed on the subject site would be a different housing option, perhaps for one of Dr. Dechter's staff members.

Addressing the Sector Plan's specific recommendation for the subject site, Mr. Landfair noted that the plan describes the site as suitable for R-90 cluster zoning to facilitate relocation of the existing curb cut from Georgia Avenue to Weller Road. He noted that this recommendation did not suggest that special exceptions were discouraged at this location, because special exceptions could be permitted as part of an R-90 cluster development. Tr. Aug. 2006 at 62. Mr. Landfair explained that R-90 cluster development allows development under standards that are different from traditional R-90 development, which allows the development of either detached homes or townhouses, depending on the size of the parcel. In this instance, the property is not large enough to permit townhouse

development, so the only option would be single-family detached with a maximum of three units. The lot sizes, however, would be different from standard R-90 lots.

Mr. Landfair presented a conceptual drawing of what R-90 cluster development, permitted by right, might look like on the subject site. The drawing shows what he considers to be a reasonable development alternative, with three 5,000-square-foot detached homes on individual lots. All of the homes meet the setback requirements, and two of them are shown smaller than the maximum permitted. Mr. Landfair acknowledged that the drawing depicts larger homes than are typically found in the immediately adjacent neighborhood, but he stated that the sizes would be consistent with current housing trends in the County. Tr. Aug. 2006 at 66. The building heights shown are about the same as the building the Petitioner proposes – two story homes with pitched roofs, about 25 feet high, compared to a mean height for the Petitioner's proposal (averaging the heights of the different roof sections) of nearly 22 feet. In terms of square footage, the Petitioner proposes a total of 5,762 square feet, and the three homes on the conceptual drawing would have a combined total of slightly over 16,000 square feet, including basements. The Petitioner proposes approximately 10.6 percent lot coverage, and the R-90 cluster drawing depicts combined lot coverage approaching 21 percent. Mr. Landfair noted that the largest home depicted on the conceptual drawing is about the same size as the building the Petitioner proposes – about 70 feet on its longest side. The total paved area would be slightly smaller for the combined homes than for the layout the Petitioner proposes, due to the parking lot, although the green area would be larger on the Petitioner's plan. Mr. Landfair conceded that it would be possible to build smaller homes under R-90 cluster development, but suggested that based on his general knowledge of development trends, a property owner would generally build to maximize his or her investment. He noted that no more than three units would be permitted on the site under R-90 cluster development, due to the size of the site and the density limits of the zone. Tr. Aug. 2006 at 69. Mr. Landfair emphasized that he did not attempt to create a worst-case scenario in this conceptual drawing, but rather a reasonable and realistic representation.

Mr. Landfair opined that comparing the conceptual R-90 cluster drawing with the site plan proposed in this case, the Petitioner's proposal would result in a much greener appearance, with more landscaping.

Mr. Landfair stated that the location of the driveway was effectively dictated by the setback required from the side property line, abutting a residential use, and the desire to avoid harming the large walnut tree. Those two constraints left a relatively narrow area in which to locate the driveway. He considers it fortunate that this location is as far as possible from the intersection with Georgia Avenue, to avoid any impacts on the intersection. Mr. Landfair noted that the property is about 180 feet long on the Weller Road side, from the point where land is to be dedicated for the truncation at the intersection to the property line. He stated that the driveway is required to be 20 feet wide to accommodate two-way movements.

Turning to the operational characteristics of the proposed use, Mr. Landfair stated that the number of patients per day has been reduced by about one third, from 80 to 55. In addition, the proposed staffing has been reduced by about 20 percent, from 5.5 full-time equivalents to 4.5 full-time equivalents. Tr. Aug. 2006 at 72. Technical Staff contends that the staffing has not actually been reduced. The Hearing Examiner considers this point unimportant,, because the crucial issue is what is currently proposed, not the comparison. Mr. Landfair noted that internal to the building, the number of operatories has been reduced from seven to six. He opined that the reduction in patients per day, staffing and number of operatories represent a significant reduction from a planning perspective. Together with the reduction in the size of the building, Mr. Landfair opined, these changes result in an application that continues to satisfy the general and specific conditions. Tr. Aug. 2006 at 73.

Mr. Landfair noted that he has previously reviewed special exception applications for medical and dental office uses, in private practice and during his 18 years on the staff of the MNCPPC. Based on his experience in such cases, he does not consider Saturday hours, or weekday hours extending into the early evening one day a week, to be a non-inherent characteristic of a medical or dental office. He testified that he has found hours of that nature to be fairly typical. Even if such hours

are considered non-inherent, Mr. Landfair opined that they do not produce a level of activity or intensity that would produce any inharmonious effects on the adjacent neighborhood. Tr. Aug. 2006 at 74.

Mr. Landfair opined that even if they are considered non-inherent characteristics, neither the proposed two-lane driveway nor the parking area would have adverse effects on adjacent properties, because of adequate setbacks and visual screening. Tr. Aug. 2006 at 75. In addition, the driveway would be sufficiently far from the Georgia Avenue intersection to avoid conflicts.

Mr. Landfair noted that the Zoning Ordinance requires ten parking spaces for the proposed use, and the Petitioner proposes 12 (or 14, on the alternate plan). Mr. Landfair considers a parking facility to be an inherent characteristic of a dental office. He acknowledged that the size of the parking lot might be considered non-inherent, but opined that even if that were the case, the size would not be “problematic to the surrounding area.” Tr. Aug. 2006 at 76.

In reference to the Staff Report’s suggestion that a typical dental office in a single-family dwelling has, on average, four dental chairs, Mr. Landfair testified that he is not aware of any such standard having been recognized in the County or nationally. Tr. Aug. 2006 at 76. He agreed, moreover, that even if four chairs were considered an average, that suggests that some facilities would have two, six or five chairs. *Id.* [Technical Staff did not, in fact, describe four chairs as an average; the Staff Report states that a “typical dental practice in a residential neighborhood generally consists of not more than four chairs.” 2006 Staff Report at 17.]

Mr. Landfair opined that the level of activity associated with the proposed use, with six operatories, 4.5 full-time equivalent employees, 55 patients per day, and 2,426 square feet of office space, would not lead to an intensity and scale of activity creating a non-inherent adverse effect at this location. He considers the use as proposed to be fairly typical of this type of use. Mr. Landfair considers the parking, lighting, building, and traffic to be inherent adverse effects of the proposed use, and finds that these effects would not be greater or more severe at this location than they would be in the R-90 Zone at another location. Tr. Aug. 2006 at 77-78. Furthermore, he believes that because of the size and corner location of the subject site, the use has been designed to meet the Petitioner’s

needs as well as the Zoning Ordinance requirements, while also ensuring compatibility. *Id.* Mr. Landfair considers this difficult to do in many residential areas, because the properties are not configured to accommodate the parking, or are simply too small.

Mr. Landfair opined that the proposed development complies with the specific conditions for the use. He noted that the Petitioner proposes only two dentists, and 58 percent of the building would be devoted to residential use. Dr. Dechter testified as to the non-availability of office space in nearby professional buildings or commercial areas, either in Glenmont or in Aspen Hill. Mr. Landfair drew attention to testimony about the unique requirements for a dental practice, as opposed to a general medical office. Many commercial buildings, he observed, do not have the kind of plumbing necessary for a dental office. Mr. Landfair opined that the proposed use would not be a nuisance because of noise, traffic or physical activity. He declared that most of the physical activity would be interior to the building, and that traffic would be spread throughout the day because of the way patients are scheduled. Mr. Landfair further opined that the proposed use would not affect the area adversely because of the design of the building, the extensive green area, fencing, setbacks and limits on imperviousness.

Mr. Landfair reiterated his opinion that the proposed use would be consistent with the goals of the Sector Plan. He noted that police and fire services are located about half a mile away, and that the Glenmont Metro is closer still. He stated that the property is served by public water and sewer, and he is not aware of any deficiencies in those services, nor do the engineers for this project believe that the project would cause any such problems. Mr. Landfair noted that the Petitioner plans to use a type of paving material that is not completely impervious, so it will allow for some filtration of run-off through the pavement itself. In addition, the grading plan would create gentle swales along the pavement edge to allow water to seep into the swales, rather than onto adjacent properties. With this and other stormwater management measures, Mr. Landfair believes that the proposed use would have no adverse effects due to stormwater run-off. He acknowledged, moreover, that if this project proceeds, it will have to go through subdivision, where storm drainage will be discussed again.

Mr. Landfair opined that the proposed use would be in harmony with the character of the neighborhood, as that neighborhood was defined by Technical Staff. Tr. Aug. 2006 at 82-83. Mr. Landfair observed that the neighborhood is predominantly residential, although it has two churches and the Metro station. He noted that along major roadways like Georgia Avenue, it is common to have uses such as apartments, townhouses, schools and churches, which produce greater population density, because of the traffic generated and the need for good access. Thus, the subject site is located in an area that generally has a greater population density than would be associated with the interior of single-family residential areas, such as along Weller Road. Tr. Aug. 2006 at 83-84. Mr. Landfair opined that a dental or medical office typically produces a population per day, in terms of staff, dentists and patients, which is greater than a typical single-family residential use, so this is not a non-inherent characteristic.

Mr. Landfair considers the proposed building to be compatible with the character of the neighborhood due to its architectural elements, roof line, setbacks and landscaping. He finds that the intensity and character of activity on the site would be in harmony with the neighborhood because most of the activity would take place indoors, and appointments would be scheduled to ensure that traffic flow is not concentrated during a particular time of day. Moreover, he suggested that most traffic will come from Georgia Avenue, rather than going through the neighborhood. Tr. Aug. 2006 at 85. In addition, the parking will be largely screened from view.

Mr. Landfair observed that the only special exception in the immediate vicinity of the subject property is Dr. Dechter's current office, across Georgia Avenue. He opined that that proposed use, when evaluated in conjunction with other special exceptions in the neighborhood, would not alter the residential character of the neighborhood or affect it adversely. Tr. Aug. 2006 at 94.

In response to questioning by the People's Counsel, Mr. Landfair elaborated on his earlier statement that only one handicapped-accessible parking space is required, per the ADA. Accordingly, he proposes to remove the handicapped designation from one of the parking spaces on the site plan.

In response to questioning by the Hearing Examiner, Mr. Landfair reiterated that he worked on the Technical Staff at MNCPPC for 18 years, and has now been in private practice for two and half years. He estimated that he has reviewed hundreds of special exception applications, including medical and dental offices, many of which were approved with parking facilities comparable to or larger than what the Petitioner proposes. Tr. Aug. 2006 at 98. He considers the subject site ideal for the use, except for the constraints created by the critical root zones of the Walnut and Maple trees. Mr. Landfair emphasized that with the proposed fencing and landscaping, he sees no compatibility concern with regard to the adjacent neighbors. He also acknowledged that the primary feature of the neighborhood is Georgia Avenue, which is a major highway, and that one would take a different approach if the site were in the interior of this neighborhood. Tr. Aug. 2006 at 166-67.

Mr. Landfair estimated the first floor footprint of the building at about 3,200 square feet, not including porches or the area wells that would provide air and light to the basement. Tr. Aug. 2006 at 103-104. Including the porches and area wells, he estimates 4,000 square feet.

2. Allen Neyman, architect. Tr. Aug. 2006 at 105-131.

Mr. Neyman was designated an expert in architecture. He has been the architect for this project since its inception, and described the revisions to the proposed building in the current submissions. Mr. Neyman stated that the first floor of the office was decreased from 2,600 square feet to 2,064 square feet, partly by creating a second story loft office towards the center, in the high part of the structure. This office would not be used to treat patients, and Mr. Neyman believes that it would be considered ADA-compliant because it is a duplication of office space that would also be provided on the first floor.⁹ Thus, he argues, the civil rights of a handicapped person, whether employee or patient, would not be infringed because everything available on the second floor would also be available on the first, or ground, floor. Both offices would be available to the two dentists for normal office work, including paperwork and patient consultations. Tr. Aug. 2006 at 108. The other significant internal

⁹ Mr. Neyman discussed this proposal with the Maryland Department of Community Development, which stated that it would consider approving it under their interpretation of ADA regulations. The final determination would take place in connection with review of a building permit application.

change to the office space was reducing the number of operatories from seven to six. Mr. Neyman stated that the operatories cannot be reduced from their 11 x 11 foot size because they are ergonomically and technologically designed, by experts in dental technology, to maximize the amount of services, equipment and implements that can be retained for a single patient and practitioner to be in a particular space. Tr. Aug. 2006 at 112. Mr. Neyman emphasized that the office space as currently proposed is the bare minimum for a modern dental office.

Mr. Neyman testified that based on his experience in designing dental and medical offices, the professional and code requirements for a dental office have generally resulted in increasing the size of office space for dentists. He stated that whereas single dentists still sometimes practice with a single operatory, under today's style of practice, a single dentist should have three or four operatories at his disposal so that he can attend to more than one patient, e.g. while one patient is with a hygienist, or while a dental procedure requires a waiting period. Tr. Aug. 2006 at 116-117. In addition, ADA requirements have had an enormous effect on building design, both how people get into a building and how they move around inside. The size of a handicapped-accessible toilet room, for instance, is about 60 percent larger than one that is not accessible. This also pertains to hallways, clear floor areas, the turning radius for a reception area, sterilization areas, laboratories, etc. Mr. Neyman has been to Dr. Dechter's current offices, which are not handicapped-accessible and, he believes, could never reach that standard, with the exception of one room that approaches it.

Another significant space requirement in modern medical offices, due to the rise in complications with billing and insurance, is a divided reception area – one area for patients and families to wait, and a separate, more private area, for staff to discuss billing and insurance issues. *Id.* at 119. Mr. Neyman noted that all of these space requirements are the same whether a dental office is located in a commercially zoned space or in a residential setting.

Mr. Neyman noted that the building footprint was reduced by 630 square feet. *Id.* at 109. On the residential side, the footprint did not change dramatically, but the second floor was reduced from three bedrooms to two, with a third bedroom in the basement level. (A basement is

proposed only underneath the residential portion of the building.) He stated that the size reduction was achieved in part by removing both the internal garage and the free-standing garage that were part of the original design. Taking into account all of the originally proposed structures and square footage, Mr. Neyman confirmed Mr. Landfair's testimony that the building square footage now proposed is 21 percent lower than that proposed on the earlier plans. Building coverage has decreased from 13.6 percent to 8.6 percent (based on the 12-space parking lot).

Mr. Neyman also addressed building height, noting that in the earlier design, the building had two distinct heights, one for office and one for residential. The higher height has now been reduced to 21 feet 9 inches, while the lower height has not been changed. In addition, the side porch has been removed. The overall result of the combined changes, he contended, is a building with less mass, less height and less building coverage.

Mr. Neyman opined that the proposed building would have a distinctly residential appearance, designed to fit into the neighborhood. He stated that except for neighborhoods that were created with a specific architectural style, most neighborhoods in Montgomery County, including the neighborhood of the subject site, do not have a defined architectural style. *Id.* at 120. The building proposed here would have many obvious residential elements: sloped roofs, doubles-hung windows, brick and siding, asphalt shingle roofing – all elements that Mr. Neyman contends can be found on 98 percent of the houses in the neighborhood. He also stated that the building was designed with a “house structure,” because of its scale and to give it some identity. In Mr. Neyman's view, no element of the proposed building would create the impression of an institutional or commercial structure.

Mr. Neyman explained the basis for his opinion that the proposed building would be compatible with the surrounding neighborhood. He acknowledged that the proposed building would be larger than many of the nearby houses, but noted that it would be quite a bit smaller than many of the buildings along Georgia Avenue, including the Glenmont United Methodist Church to the north, the Assembly of God Church to the south, the townhouse blocks of the adjacent Windsor Square community, the apartment buildings of Glenmont Heights across Georgia Avenue, and the Glenmont

Shopping Center. The adjacent townhouses, for example, are taller than the proposed building. Most of the buildings are much larger than the proposed building, roughly 120 feet long, although the building that fronts on Georgia Avenue measures about 70 feet by 35 ft, which is very similar in mass to the building proposed here.

Mr. Neyman described Georgia Avenue, at this location, as a “high speed, high volume collector road . . . that has radically . . . changed the future of this neighborhood . . . and will continue to have the effect of transitioning all of the uses along this edge or this border from now into the future.” Tr. August 30 at 124-25. Mr. Neyman described the transition of Georgia Avenue as part of the nature of urban development. He argued that the special exception should be approved to allow a vital health service to continue to be provided to the neighborhood, in a new, state-of-the-art facility. Mr. Neyman stated that the current trend in development is people wanting to live, work, shop and worship in the same neighborhood, so they should be able to also get medical services in their neighborhood.

With regard to the need to provide an effective visual screen between the parking area and adjacent uses, Mr. Neyman opined that the fence proposed would be just right for that purpose. *Id.* at 128. He noted that parking lots are a necessary and normal element of a dental or medical office. Mr. Neyman also noted that in designing the proposed facility, he consulted a guide to dental office design published by the American Dental Association (see Ex. 77(e)). *Id.* When asked whether the scale of the proposed use would be in harmony with the residential character of the neighborhood, Mr. Neyman stated that use is already in the neighborhood, but the new location would allow it to serve the neighborhood better. He opined that the use would be in harmony with the neighborhood and would be an amenity. *Id.* at 130.

3. Alan Dechter, petitioner. Tr. Aug. 2006 at 131-63.

Dr. Dechter confirmed his earlier testimony that he has been a practicing dentist in Maryland, at the location across from the subject site, for 24 years. He described his practice as a general dental practice serving the needs of all ages. Dr. Dechter indicated that he reviewed the zip codes of his patients before the hearing, and found that a large portion come from the same zip code as

his current office, or the adjacent zip codes. He found that all ages are pretty well represented, although there has been a significant growth in the 60 to 80 age group as the practice has aged.

Dr. Dechter testified that at his current location across, from the subject site, some of his patients park on Weller Road. He noted that there are parking restrictions on Weller Road to prevent all-day parking, which are the result of a petition that he put together and brought the whole block together to push. Dr. Dechter stated an intention to push for the same restriction on the north side of Georgia Avenue, if the proposed special exception is approved, because currently there are six or seven commuters parked on Weller Road along the subject site all day, every day, to avoid paying for parking at the Glenmont Metro garage. Tr. Aug. 2006 at 134.

Dr. Dechter stated that he has never had any complaints from neighbors or public officials about street parking connected to his current practice. He currently has a second dentist working with him, which would continue at the new location. He currently employs four full-time equivalent staff (receptionist, assistant, hygienists), and proposes to increase that to 4.5 in connection with this proposal. Dr. Dechter stated that in his view, it is not uncommon for a dental office in a residential setting to have two dentists and the equivalent of four and half full-time staff people. He considers that level of staffing normal. He explained that his practice would not function with the limit of three staff members on site at one time that Technical Staff has recommended: each dentist needs an assistant, typically each dentist supervises one hygienist, plus they need front desk staff. When asked by the Hearing Examiner how many staff members the practice requires on site at one time, Dr. Dechter stated that they need six: two hygienists, two assistants and two front desk people, plus the two dentists.

Dr. Dechter maintained that the standard of care, facilities and services available from dentists should be no different for a dentist located in a commercially zoned area or one in a residential area. *Id.* at 138. He confirmed that occupational safety and professional regulations today require larger dental offices than 10 or 20 years ago. These include sterilization and infection control, which have changed dramatically in the last 20 years. Equipment for cleaning and storing instruments, film

processors and preset trays for procedures all need to be stored in a sterile environment. X-ray machines today take up more space than they used to. ADA regulations require larger hallways, operatories and bathrooms. In addition, Dr. Dechter noted, federal HIPA regulations protecting patient privacy make it very important to have spaces for private consultations with patients, and for confidential record-keeping. Compliance with insurance paperwork requirements call for additional space. Dr. Dechter observed that many of these requirements are in the American Dental Association publication referred to by Mr. Neyman (Ex. 77(e)). His practice also needs extra seating in the waiting area for families that come for multiple appointments.

Dr. Dechter noted that the American Dental Association design publication recommends four treatment rooms per dentist: two for the dentist, one for a hygienist, and one for either an emergency patient or a patient waiting for a material to cure or a medication to take effect. That would call for eight operatories, two more than Dr. Dechter is proposing. He noted that he is not currently operating consistent with the American Dental Association standards because he has no room for emergencies, minimal handicapped accessibility, insufficient space to maintain the privacy of patient records, insufficient space for accurate record keeping, and inadequate space to update his equipment and fully meet the community's needs.

Dr. Dechter testified that he receives unscheduled patients who are often in emergency-type situations. He noted that a lot of his patients walk or take public transportation, using the bus stop across the street from the church, or the nearby Metro station. With regard to unscheduled patients, he estimated that he has about four to five per day. Some of them have emergency needs, and others simply walk in because of the neighborhood familiarity of the practice.

Dr. Dechter testified that there is no suitable space available in the closest professional office building, which is in Aspen Hill, or in the nearest commercially zoned area, in Glenmont.

Turning to the early evening and Saturday hours he proposes, Dr. Dechter stated that his office is in a working class neighborhood, with a lot of dual-income families that cannot take time off of work, and cannot bring their children in for appointments during regular hours. He has found that

evening and Saturday hours are very helpful to the surrounding community. Dr. Dechter does not consider evening and Saturday hours unusual for dentists. He stated that many of his colleagues are open more than one evening a week, and all day on Saturday.

Dr. Dechter observed that he has discussed the present application with his neighbors, and all are in favor, including the adjacent townhouse community and the townhouse community across the street. (Dr. Dechter stated that Glenmont Heights has been described as an apartment community, but he believes it is made up of townhouses. *Id.* at 148-49.)

In closing his direct testimony, Dr. Dechter observed that during the week or two before this hearing, which was right before school started, his office was pretty busy. There were a lot of kids who walked to the office, and some older kids bringing their siblings. He noticed that they have added six portable classrooms to the local elementary school and opened a new middle school (after having given up a middle school, then reclaimed it because of growth in the neighborhood). It really hit home for him that forcing him out of this neighborhood would take away an amenity for a population "that really deserves access to the care that I have provided the past 24 years." Tr. Aug. 2006 at 150. Dr. Dechter added: "I think it's a much maligned neighborhood, between what's gone on there with the middle school, with the Glenmont Shopping Center that nobody can seem to do anything about. And I think it would be a real disservice to the community to force me out of that area." *Id.* He noted that he would be better off financially without doing this project, which speaks to his commitment and his motivation. *Id.*

In response to questions from the Hearing Examiner, Dr. Dechter provided more detail regarding staffing. Addressing the decrease in patients from 80 to 55, Dr. Dechter stated that he has had a change in philosophy during the course of this case. Between the first hearing and the second, his hygiene schedule has increased from 45 minutes to one hour per patient, out of a desire to be more comprehensive. As he put it, he wants to be a better dentist, and that doesn't mean he will have four times as many patients or three times the staff, but he can't provide the quality of care he seeks to without the new facility.

Dr. Dechter acknowledged that patients sometimes park on Weller Road to reach his current practice, and that they may do so at the current site as well. Tr. Aug. 2006 at 159. He stated, however, that his patients parking there for half an hour or an hour would have a lot less impact than the current parking situation, where commuters are parked all the way to the corner, blocking the view for people exiting onto Georgia Avenue. Dr. Dechter said that situation is not going to change unless he does something about it, because no one from the neighborhood parks on that stretch of Weller Road. *Id.* at 159-60. [Mr. Landfair estimated that four vehicles could safely park along the subject site's Weller Road frontage, and four more on the other side of Weller Road, without creating safety concerns for the Georgia Avenue intersection. *Id.* at 161-62.]

Finally, Dr. Dechter confirmed that he agrees with Mr. Landfair's suggestion to designate only one parking space for exclusive use by persons with disabilities. He noted that the configuration currently proposed includes several spaces near the entrance that are easy to get in and out of, and he would rather preserve the flexibility to leave all but one space for general use. *Id.* at 162-62.

B. People's Counsel

The People's Counsel, Martin Klauber, offered a closing statement at the remand hearing that addressed a basic public interest issue brought out in this case. He noted that Dr. Dechter has been practicing medicine for 24 years, all of them in this community. He has proposed a facility that will better treat his patients, and that will keep Dr. Dechter in this community, hopefully for a long time before he decides to retire. Mr. Klauber opined that the public interest would be served in this case by granting the requested special exception, to allow Dr. Dechter to serve this community even better than he has in the past. Tr. Aug. 2006 at 170-71.

IV. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. The special exception is also evaluated in a site-specific context because there may be locations where it is not

appropriate. Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed special exception, with the conditions recommended at the end of this report, would satisfy all of the specific and general requirements for the use.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a medical practitioners’ office for use of other than a resident of the building. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

The Hearing Examiner identifies physical and operational characteristics typically associated with a medical practitioners' office to include a single-family structure to house the two uses (residence and medical office); a parking facility adequate to accommodate residents, employees and visitors; adequate exterior lighting for both uses; an identification sign; and trips to and from the site by residents, patients, employees and delivery services. Technical Staff considers a building, a parking facility, lighting, and trips to and from the site by patients and residents to be inherent characteristics of this category of use. See 2006 Staff Report at 14. Technical Staff identified the following as non-inherent effects in the present case: hours of operation, number of parking spaces, traffic on and around the site, and the location and size of the driveway. To mitigate these potential non-inherent adverse effects, Staff recommends limiting patient appointments to five in any one hour; limiting staff to three on site at one time, in addition to the two dentists, which was apparently intended to reduce parking demand; and providing 14 parking spaces. See 2006 Staff Report at 16. With these conditions, Staff recommended approval of the special exception.

With the exception of the number of parking spaces, the Hearing Examiner does not agree with Technical Staff's identification of non-inherent effects. Moreover, even if the elements named by Technical Staff are considered non-inherent, the Hearing Examiner finds that their potential adverse impacts are not sufficient to warrant denial of the special exception.

1. Non-inherent Adverse Effects Identified by Technical Staff

Hours of Operation. Mr. Landfair testified that based on his extensive experience in evaluating medical office special exceptions, the proposed hours of operation, including limited Saturday and weeknight hours, are typical for the use. Dr. Dechter testified that weekend and evening hours are essential for many of his patients, who are working class people and cannot take time off during the day for medical care. He also stated that Saturday and weeknight hours are very common for dentists, and that some of his colleagues have more extensive Saturday and weeknight hours than he proposes. Technical Staff did not explain the basis for their conclusion on this point. Based on the testimony of Dr. Dechter and Mr. Landfair, which the Hearing Examiner found highly credible, as well other medical

practitioner's special exceptions, the Hearing Examiner considers the requested hours of operation to be an inherent characteristic of the use. The record contains Board opinions in several medical practitioners' special exception cases which, in response to today's era of double-income families and busy schedules, included hours of operation outside the typical Monday to Friday workday.¹⁰ Dr. Dechter proposes to open early and close a bit late, extending past 6:00 p.m. only one night a week. On Saturday, he proposes to open for half a day. Based on the evidence of record, the Hearing Examiner does not consider these hours to be unusual.

Even if the hours of operation were considered non-inherent, they extend outside normal business hours only slightly, and in the evenings only once a week. In light of the extensive screening and fencing proposed for the site, and the agreed-upon limitations on numbers of patients and staff, the Hearing Examiner concludes that any adverse impacts due to the proposed hours of operation would be very minor.

Number of Parking Spaces. The Hearing Examiner agrees with Technical Staff that the number of parking spaces should be considered a non-inherent physical characteristic of the use because, comparing the number of spaces to the number of patients, employees and residents, there is a risk that parking demand would exceed the number of spaces in the parking lot, leading to overflow parking on the street. Typically, the Hearing Examiner would expect a medical practitioners' office, even in a residential neighborhood, to have sufficient parking on site to avoid off-site parking. However, the evidence suggests that potential parking overflow would likely be occasional in frequency and short in duration. Moreover, the site's corner location makes ample room available for on-street parking between the site driveway and the corner, or across the street, in locations that would not be in front of any existing residence. The homes on Weller Road have driveways and garages, so neighborhood residents likely do not have a heavy demand for on-street parking. For all of these reasons, the

¹⁰ See, e.g., Case No. S-1735 (1989), medical office with hours of operation to 7:00 p.m. on Tuesday and Thursday and 10:00 a.m. to 2:00 p.m. on Saturdays (Ex. 90(a)); Case No. S-1910 (1992), medical office with hours of 9:00 a.m. to 1:00 p.m. on Saturdays (Ex. 62); Case No. S-2415 (2000), medical office with hours of 10:00 a.m. to 1:00 p.m. on Saturdays (Ex. 83); Case No. S-2864 (2001), medical office, with condition stating that the doctor "shall not hold office hours after 8:00 p.m., Monday through Saturday, or on Sunday, except for emergencies." Ex. 64.

Hearing Examiner concludes that the potential adverse effects of the number of parking spaces proposed for the subject site are not sufficient to warrant denial of the special exception.

Technical Staff did not explain the basis for its finding that the number of parking spaces is a non-inherent characteristic of the proposed use. The preceding paragraph addresses the sufficiency of the number of spaces to serve the parking demand. The connection between the number of spaces and the size of the parking facility will also be addressed, both because the size may have played a role in Technical Staff's conclusion, and because the Board considered the size of the parking lot to be a non-inherent characteristic during the 2005 proceedings.

The Hearing Examiner does not consider the proposed parking lot to be a non-inherent characteristic of the use by virtue of being too large, or commercial in its appearance. Section 59-E-3.7 of the Zoning Ordinance requires at least four parking spaces for each medical practitioner "occupying or using" a medical practitioner's office. See Code p. 59E-29. Section 59-E-3.7 also requires two parking spaces for any one-family dwelling.¹¹ See Code p. 59E-26. As a result, any medical practitioner's office operating under this special exception category must, if it has two medical practitioners as permitted under the specific conditions for the use, have at least ten parking spaces: four for each medical practitioner plus two for the residential use. It is difficult to imagine how a parking facility with ten spaces could have a residential appearance. Thus, satisfying the minimum parking requirements of the Zoning Ordinance for this category of special exception with two medical practitioners requires a parking facility that will necessarily be commercial in appearance.¹² It is the Petitioner's responsibility to mitigate the potential inherent adverse effects of the parking facility, which

¹¹ In the Hearing Examiner's opinion, the dwelling unit proposed in this case meets the description of one-family dwelling better than any other dwelling category. See Code § 59-A-2.1.

¹² This reality is reflected in medical practitioners' special exceptions that have been approved by the Board, in residential neighborhoods, with parking lots similar in size and appearance to the one proposed in this case. See, e.g., Case No. A-4170 (1998), granting variances from parking lot setback and landscaping requirements, as well as driveway width requirement, for Special Exception No. S-695, a medical office on Wayne Avenue in Silver Spring, in the R-60 Zone, with 13 parking spaces (Ex. 90(a)); Case No. S-1735 (1989), granting special exception for medical office on Georgia Avenue in the R-60 Zone, with 15 parking spaces (Ex. 90(a)); Case Nos. S-1884 and A-3361 (1991), granting special exception for medical office on New Hampshire Avenue in Silver Spring, in the R-90 Zone, with 18 parking spaces, and approving setback variances for the parking facility (Ex. 90(a)); and Case No. S-2317 (1998), granting special exception for dental office on Georgia Avenue in Olney, in the R-200 Zone, with 11 parking spaces (Ex. 90(a)).

the Petitioner in this case has done: the parking lot would be screened by fencing to the east and south, and by the building and extensive landscaping to the west and north. As Mr. Landfair testified, the view of the parking facility from Georgia Avenue would not be completely blocked, but it would not be visually prominent. The eye would more likely be drawn to the building and the landscaping than to the mostly obscured parking facility.

Traffic On and Around the Site. Technical Staff did not explain the basis for its conclusion that “traffic on and around the site” should be considered a non-inherent characteristic of the proposed use. See 2006 Staff report at 16. Technical Staff identifies trips to and from the site as an inherent characteristic of this category of special exception. See *id.* at 14. Staff must, therefore, have found something unusual about the traffic generation expected from this use that would change it from an inherent to a non-inherent characteristic.¹³ Staff clearly considers the proposed dental office to be larger than most, so it may be that in Staff’s view, the size of the proposed dental office makes its traffic generation a non-inherent characteristic. This conclusion is inconsistent, however, with Staff’s finding that with the number of patients per day reduced from 80 to 55, “there are no significant transportation impacts that would result from the proposed special exception,” *id.* at 14-15, and Staff’s conclusion that the proposed use would not constitute a nuisance because of noise, traffic or physical activity, *id.* at 18.

Logically, traffic on and around the site could be considered a non-inherent characteristic of the proposed use if the use would generate an unusually large amount of traffic for a medical practitioner’s office, or if the access or circulation pattern would be unsafe. Transportation Staff found unequivocally that access and circulation would be safe and adequate. The record contains scant evidence to support a conclusion, one way or the other, as to whether the proposed dental office would be significantly larger than typical of the use. Technical Staff states that a typical dental practice in a residential neighborhood generally consists of not more than four chairs (operatories). Mr. Landfair testified that he is not aware of such a standard having been recognized, either in the County or

¹³ Staff’s view of the size of the dental office is somewhat skewed, as the Staff Report indicates Staff believes the current proposal calls for seven operatories. See 2006 Staff Report at 16. The number of operatories proposed has been reduced from seven to six.

nationally. Tr. Aug. 2006 at 76. Without either Technical Staff or the Petitioner having cited any examples of the size of existing dental facilities in residential neighborhoods, the Hearing Examiner considers the evidence as to whether the proposed use is larger than typical to be inconclusive.

Even if the trips on and around the site are considered non-inherent, the Hearing Examiner does not consider their potential adverse effects sufficient to warrant denial. Fencing along the south and east sides, as well as a 16-foot setback, would provide a visual and noise buffer for the adjacent neighbors. The building, landscaping and a substantial front setback would buffer passerby and nearby uses on Georgia Avenue from the impacts of site traffic. Moreover, the agreed-upon limits on staffing and appointments would control the flow of vehicles in and out, tending to lead to a steady, moderate level of trips rather than periods of high-intensity arrivals and departures. All of these elements would significantly mitigate potential adverse effects.

Location and Size of Driveway. The location of the driveway was constrained by the required setback on the east and the need to protect the critical root zone of the large Walnut tree to the west. It is located as far away from the intersection with busy Georgia Avenue as possible, which is beneficial for traffic safety. The site constraints place the driveway and the parking lot 16 feet from the eastern property line, and about 30 feet from the adjacent residence. A 16-foot setback is not expansive, but the Hearing Examiner considers it inappropriate to treat the 16-foot setback from the eastern property line as a non-inherent characteristic, given that this setback satisfies the minimum requirement under the Zoning Ordinance; it cannot be considered atypical to provide the minimum driveway setback required. This does not mean that the minimum setback is always sufficient for compatibility purposes. In this case, the visual and noise impact of the driveway and parking lot would be buffered by a solid wooden fence along the eastern property line. The adjacent residence to the east would also be effectively buffered, at least in the near term, by the large, mature stand of bamboo that straddles the property line. Should that bamboo ever be cut down, there may be a need for additional buffering. The Hearing Examiner recommends, as a condition of approval, that the Board

retain jurisdiction to impose additional conditions related to the driveway or parking if future evidence so warrants.

As to the size of the driveway, its 20-foot width is dictated by the Zoning Ordinance, which states that if the entrance and exit driveways for an off-street parking facility are combined, the combined driveway shall be not less than 20 feet in width. See Code § 59-E-2.41. Thus, all medical practitioner special exceptions that have a single driveway (which would be typical in a residential setting) must make that driveway 20 feet wide. The Hearing Examiner considers it inappropriate to characterize as non-inherent something that county law requires, and which should, therefore be typical of the use.

2. Inherent Characteristics of the Use

Technical Staff considers the size of the proposed dental office to be larger than typical for a residential neighborhood, noting that the proposed building remains considerably larger than the residences in the immediate neighborhood. See 2006 Staff Report at 14. Staff did not, however identify the size of the building as a non-inherent characteristics of the proposed use, and the Hearing Examiner finds no evidence of record to suggest that it should be so identified. The record contains no evidence about the typical size of buildings used for this category of special exception. Testimony from Dr. Dechter and, at the first hearing, dental equipment salesman Daniel Nalls, established that modern dental offices are larger than in years past, so the “typical” size may depend on the age of the dental practice.

The Hearing Examiner finds, based on the preponderance of the evidence, that the size of the proposed building would have no adverse impact on the general neighborhood. The building would essentially have the appearance of a large residence, with many architectural elements which, based on undisputed testimony, are commonly found on nearby residences. It would be smaller than the nearby churches, as well as most of the buildings associated with the townhouse community to the south and the apartment/townhouse community across the street. It would be similar in size to the townhouse building immediately adjacent to the south. Moreover, the importance of the site’s location

on a busy stretch of Georgia Avenue cannot be overstated. Georgia Avenue at this location is a heavily trafficked, high-speed highway. The noise and speed of vehicles on Georgia Avenue, as well as the large expanse of the road right-of-way, dominate the landscape. The result is a setting that is not consistent with the type of quiet, peaceful neighborhood one typically associates with single-family homes. On the contrary, as Mr. Neyman testified, the growth of Georgia Avenue has radically changed the future of this neighborhood, and will continue to affect the use of properties like the subject site, which form an edge, or border, between single-family neighborhoods and the intensity of Georgia Avenue. In this context, the proposed building would be entirely appropriate.

Technical Staff emphasizes that Dr. Dechter's proposed building would be larger than many of the nearby homes. Mr. Landfair pointed out that the single-family lots in the immediate neighborhood range from 10,000 to 20,000 square feet in size, roughly between one fourth and one half the size of the subject property. He estimated that the amount of green area proposed for the subject site is comparable to or greater than what is typically found on nearby residential lots, and stated that the building coverage as a percentage of lot size is comparable. Tr. Aug. 2006 at 37. Mr. Landfair noted that the building frontages proposed for the subject site (about 50 feet along Weller Road and 70 feet along Georgia Avenue) compare very favorably, in terms of percentage of lot frontage, to existing residences on Weller Road. Even in absolute terms, he found that some of the homes on Weller Road, which tend to be long ramblers, approach the 70-foot length of the long side of Dr. Dechter's proposed building, which would face Georgia Avenue. Thus, the evidence suggests that although the proposed building would be larger than nearby homes in terms of square footage and bulk, it would occupy about the same amount of its lot, and less of its lot frontage. These factors would tend to reduce the visual impact of the building's larger size.

The Hearing Examiner considers the site lighting and signage to be inherent characteristics with no adverse effects. The exterior lighting would drop to zero long before reaching the north, south or west property lines, and would be no higher than 0.1 foot-candles along the east property line, without taking into account the effect of the proposed fence. The sign would be modest in

size, comparable to what Dr. Dechter has at his current office, and its illumination would barely spread beyond the sign itself.

For all of the above reasons, the Hearing Examiner finds that the preponderance of the evidence supports the conclusion that the inherent and non-inherent adverse effects associated with the uses proposed here are not sufficient to support denial of the special exception.

B. Specific Standards

The specific standards for a medical practitioners' office are found in §59-G-2.36. The provisions of this section and the Hearing Examiner's findings with respect thereto follow.

Sec. 59-G-2.36. Medical practitioners' office for use of other than a resident of the building.

(a) In all residential zones other than specified in Subsection (b) below, one or more offices of not more than 2 full-time medical practitioners may be permitted, provided that:

(1) The exterior of the premises is not changed or altered in appearance;

Conclusion: This provision presents a complicated legal issue. Petitioner argues that this provision should not be interpreted to prohibit an applicant for a medical practitioner's office special exception from proposing a new building. The People's Counsel argues that the plain language of this provision presupposes that there is an existing building on the site, and by implication permits the subject special exception only if it will occupy an existing building without making any exterior changes.

This issue should be considered in light of several fundamental axioms of statutory interpretation. The cardinal rule is to ascertain and effectuate legislative intent. *Mayor of Baltimore v. Chase*, 360 Md. 121, 128 (2000). Where the statutory language is plain and unambiguous according to the commonly understood meaning of the words, the inquiry is at an end – the statute means what it says. See *id.* Where the language is unambiguous, a court (or board of appeals) may neither add nor delete language so as to reflect an intent not evidenced in the language, nor may it construe the statute with “forced or subtle interpretations” that limit or extend its application. *Id.* Whenever possible, a statute should be read “so that no word, clause, sentence or phrase is rendered superfluous or

nugatory.” *Id.* Moreover, when a statute is part of a statutory scheme, legislative intent must be discerned by considering the statute in light of the statutory scheme of which it is a part. *See id.* at 129.

Having set forth the basic legal framework, the various arguments presented by the parties are summarized below, followed by the Hearing Examiner’s analysis and conclusion.

a. Petitioner’s Argument that New Building Should be Permitted

Petitioner argues that there is no express requirement in §59-G-2.36 that a single-family structure must be in existence before a special exception may be approved under this section, and that in fact, the legislative intent was *not* to require a pre-existing residential building. *See* post-hearing legal brief, Ex. 54(a), at 1-2. In support of this argument, Petitioner contrasts the language of Section 59-G-2.36 with Section 59-G-2.38, which sets forth the specific conditions for a non-resident professional office. The latter specifically states, as its very first provision, that “[a]n existing single-family structure may be used for professional office purposes by any member or members of a recognized profession . . .” 59-G-2.38. In the context of this section, the strong implication is that *only* a single-family structure may be used under this special exception. Furthermore, the section states explicitly that the property “must . . . contain a structure formerly used for nonresidential purposes.” *Id.* Finally, it permits the exterior of the premises to be changed, provided that the single-family character and basic residential appearance of the building are retained. *Id.*

Petitioner notes that a non-resident medical practitioners’ office must be in a building that is at least 50 percent devoted to residential use, thus assuring that the building will be a residential structure that is compatible with its residential neighborhood. *See* Ex. 54(a) at 3. A non-resident professional office, on the other hand, may be used entirely for office purposes. Without the requirement for at least half residential use, Petitioner argues, the legislature required professional offices to locate in pre-existing, single-family residential structures to avoid the construction of non-compatible structures in residential areas.

Similarly, Petitioner notes that the professional office requirements specify that the building must retain its residential appearance, whereas such a provision is not necessary for medical

offices, which must be dedicated at least 50 percent to residential use. Petitioner maintains that 50 percent residential use assures a residential appearance. [The Hearing Examiner notes that the medical office provisions prohibit any changes to the exterior of the building; if the section is read to permit such uses only in existing buildings, there is no danger of departing from the residential appearance, because no exterior changes can be made.]

Petitioner also looks to the statutory scheme of the Zoning Ordinance, particularly the portions dealing with special exceptions in single-family, residential zones to discern whether the legislature, in establishing special exception uses and their standards, has used express language where it sought to require the use of an existing building and prohibit new construction. Petitioner cites several special exception provisions:

- Accessory apartments (§59-G-2.00) must be located on the same lot as an existing dwelling that is at least five years old.
- Antique shops (§59-G-2.04) may be allowed only in an existing building that is at least five years old.
- In the case of Major Home Occupations (§59-G-2.29), any enlargement of the total floor area completed on or after the date of application for the special exception, or within the preceding 18 months, must be excluded from the total floor area for special exception purposes, and no separate detached building may be constructed expressly for the home occupation.
- An existing single-family structure may be used for a non-resident professional office (§59-G-2.38), with the strong implication that no other type of structure may be used.

- A teahouse or restaurant in a certain zone may be approved as a special exception only if it was existing and operating as such on March 3, 1967 (§59-G-2.57).¹⁴
- The minimum side yard setback and maximum floor area ratio do not apply to a “charitable & philanthropic institution” to be located in a building that exists lawfully at least three years before the special exception petition is filed (§59-G-2.21).

Petitioner argues that these provisions manifest an intent, on the part of the District Council, to allow certain special exception uses only in existing structures or where those structures have been in existence for a specified period of time. He notes that no such express statutory requirement is found in §59-G-2.36. See Ex. 54(a) at 7.

Petitioner argues that a statute is to be given a reasonable interpretation, not one that is illogical or incompatible with common sense, citing *State v. Bratner*, 360 MD 314, 322 (2000). He maintains that it would be illogical for the legislature to intend that a property owner acquire a vacant parcel classified under the R-90 Zone, go to the expense of building a single-family structure, then hope the Board of Appeals will approve the requested special exception. Petitioner suggests that logically, the County would want to evaluate the proposed building and its impacts on the community *before* the building is erected.

Petitioner also relies on the fact that a non-resident medical office was previously approved, in Case No. S-1910, where a new structure was to be built for the use. Bill Landfair, who wrote the Staff Report in S-1910, testified in this case that whether or not a new building was permitted was not a topic of significant discussion during that case. It is clear from the Board of Appeals’ Opinion in the case that the Board knew the proposed use would be located in a new building, but there is no discussion of whether this was legally permissible. See Ex. 13. The entirety of the Board’s finding

¹⁴ The Hearing Examiner considers this example inapplicable to the case at hand. It does not address whether a new use may be established in an existing building v. a new building. Instead, it provides a form of grandfathering protection for an existing category of uses.

concerning the requirement that no changes be made to the exterior consists of a single sentence: “A new, residential building will be erected.” *Id.* at 6. Absent discussion of the point, the undersigned finds this Opinion to be of little help in the present case. Moreover, as the Board stated in that very Opinion, each “petition for a special exception is evaluated on its own merit and no grant of a special exception is considered to be ‘setting a precedent.’” *Id.* at 5.

b. People’s Counsel’s Argument that New Building is Not Permitted as a Matter of Law

The People’s Counsel argues that under the statutory scheme of the Montgomery County Zoning Ordinance, a use must be positively provided for to be permitted – the absence of a prohibition against it is not enough. He maintains that the language in question, which states that a medical office may be allowed under this section provided that “[t]he exterior of the premises is not changed or altered in appearance,” clearly and unambiguously assumes that there is an existing structure on the site. See Tr. June 2005 at 188-89. In the face of this language, he argues that the Zoning Ordinance requires denial of the requested special exception.

c. Hearing Examiner’s Analysis and Conclusion

Having the considered the arguments presented, the Hearing Examiner finds that the plain meaning of the words in question is not clear and unambiguous, as manifested by the swirling controversy these words have created in this case. As noted above, the undersigned does not find the approval of special exception case No. S-1910 in 1992, without discussion of §59-G-2.36(a)(1), to be informative or persuasive. Petitioner correctly identified other special exception categories where the District Council established a requirement for an existing building in a clearer, more unambiguous fashion than was done in §59-G-2.36. These examples are not enough, however, to persuade the undersigned that the District Council had a contrary intent in §59-G-2.36.

The most immediate context in which §59-G-2.36(a)(1) should be considered is the full list of specific conditions for the use – the rest of the section of which it is a part. Taken as a whole, the section demonstrates an intent to permit medical offices in single-family residential neighborhoods only where they will have limited impacts: no changes to the exterior of the premises, which ensures

continued compatibility of the structure with the neighborhood; at least 50 percent of the space used for residential purposes, which ensures some degree of use compatibility; permitting medical offices in residential zones only where there is no other suitable space available nearby, indicating that the proposed use will meet a community need; and limiting the intensity of the use by restricting the number of medical professionals and staff. The provisions of § 59-G-2.36(b), which pertain to medical practitioners' offices in multi-family zones, rather than single-family zones, make no mention of existing structures. They do specify, however, that the exterior of the building must present an appearance "consistent with the character of the neighborhood," in recognition, perhaps, that the appearance of the building must be considered where a new building may be permitted.

Read in the context of the section as a whole, the Hearing Examiner finds that section 59-G-2.36(a)(1) is ambiguous when applied to the unusual facts in this case. While the clear intent of the Council was to preserve compatibility by restricting exterior changes, it would defeat Council's intent if its words were interpreted to prevent the replacement of a condemned eyesore with a modern, compatible building. The instant case is rather unique, because Petitioner had little choice about re-using the original dwelling: the building had been condemned as uninhabitable, and due to its advanced state of deterioration, it could not have been re-occupied without changes, both interior and exterior. Logic suggests that this provision be interpreted to permit construction of a new building where the pre-existing residential structure was condemned as uninhabitable, provided that the new building is compatible with the residential neighborhood. Thus, under the narrow factual circumstances of this case, the Hearing Examiner finds that the special exception may be approved, despite the fact that it involves construction of a new building.

- (2) Not less than 50 percent of the floor space of the building is devoted to residential uses;

Conclusion: Petitioner proposes to devote approximately 57 percent of the floor space to residential use.

- (3) Office space suitable for the practice of the profession is unavailable in either the nearest commercial zone or the nearest medical clinic office building constructed according to a special exception grant;

Conclusion: Petitioner's undisputed testimony established that no suitable, handicapped-accessible office space is available nearby, either in a commercial zone or in a medical clinic office building. He also testified that for some of his handicapped patients, the availability of dental care in a residential setting is a significant benefit, making it easier and more comfortable for them to see a dentist.

- (3) Additional medical specialists are not employed more than an aggregate of 40 hours per week and there are never more than 2 medical professionals, whether general practitioners or medical specialists, in such office on any one day. In consideration of an application for part-time medical specialist, the Board must consider the total number of employees and the total number of patients at any one time;

Conclusion: The proposed dental practice would employ no more than two dentists.

- (4) The maximum number of nonprofessional support staff must be determined by the Board, taking into account the impact on neighboring residences of the resultant parking and traffic;

Conclusion: The proposed conditions of approval limit the use to a maximum of nine part-time dental assistants and office staff (4.5 full-time equivalent), with no more than six staff members on site at one time, in addition to the two dentists. These conditions, as well as limitations on the number of patient appointments, are designed to control the impact on neighboring residences of parking and traffic resulting from the proposed use. As discussed in Part II.F. above, the Hearing Examiner finds that although the potential exists for parking demand to exceed the available number of spaces, any resulting on-street parking would be occasional in frequency and brief in duration, with minimal adverse effects. On-street parking would take place only if all staff were on site, five patients arrived in five separate vehicles, and either the tenants in the residential unit were occupying two parking spaces, or none of the vehicles seeking parking was eligible to use a handicapped-designated space. The evidence suggests that the confluence of these events would be fairly infrequent, particularly considering that a large number of patients are handicapped, a number of patients arrive on foot or by public transit, and more than one patient may arrive in a single vehicle.

Because most of the staff tend to arrive either before the office opens in the morning or before it re-opens after lunch, staff would likely be able to find on-site parking. Accordingly, any overflow parking would likely be patients, whose stay on the site would be relatively short (typically about an hour, based on Dr. Dechter's testimony). Moreover, there is ample space to park on the street, along the site frontage and abutting the church property, without parking in front of anyone's home. Accordingly, the Hearing Examiner concludes that Dr. Dechter can be permitted to have six staff members on site at one time without causing significant adverse impacts due to parking. To guard against the possibility that on-street parking becomes a serious imposition on the neighborhood, the Hearing Examiner recommends that the Board reserve jurisdiction to impose additional conditions regarding parking if future evidence so warrants. The Hearing Examiner also recommends that the number of parking spaces be increased from 12 to 14 to reduce the likelihood of parking overflow. Adding two more parking spaces could have an impact on the large Walnut tree near the driveway entrance, but it is an essential measure, and hopefully the critical root zones can be protected.

- (5) Such use will not constitute a nuisance because of noise, traffic or physical activity; and

Conclusion: The evidence supports a finding that the proposed use would not be a nuisance because of noise, traffic or physical activity. Due to the nature of a dental clinic, exterior noise, traffic and physical activity would be limited to the use of the parking lot and driveway. The proposed conditions of approval would place limitations on the number of trips and parking demand, which would prevent the noise, traffic and physical activity in the parking lot from becoming a nuisance. The residential use could involve more exterior activity than the dental practice, but nothing in the record suggests that this would involve anything other than normal residential activities.

- (6) Such use will not tend to affect adversely the use and development of neighboring properties and the general neighborhood.

Conclusion: Technical Staff raises a concern that the assemblage of two residential parcels, which Staff describes as previously improved by at least two residential units, to construct a large building may become a model for future special exception uses in residential zones. The Hearing

Examiner notes that based on the testimony of Dr. Dechter, who has operated his dental practice across the street from the subject site for 24 years, the subject property was assembled more than 24 years ago, and was used for a single residence. He reports that the accessory buildings were (i) a home for a caretaker for a handicapped child, which was associated with the main dwelling and later used for storage; and (ii) a garage. In the absence of any direct evidence concerning the past use of the subject site, the Hearing Examiner finds Dr. Dechter's testimony on this point more credible than Staff's unsupported statement.

More fundamentally, as the Board is keenly aware, each special exception application is evaluated on its own merits. There may be instances where the assemblage of previously unconnected parcels for a new special exception would lead to a use that is too large to be compatible with the surrounding neighborhood, in which case the Board would not hesitate to deny the application. In other cases, the assemblage of unconnected land may provide an ideal location for a special exception that can be compatible at that location precisely because land assembly provided enough space for adequate buffers. The Hearing Examiner does not consider the assembly of land, in and of itself, to be harmful.

Despite recommending approval of the petitioner, Technical Staff continues to have reservations about the compatibility of the proposed building due to its size and scale. Staff acknowledges that modern dental practice may require larger offices, but observes that the issue is not how much space a dental office legitimately needs, but rather whether the size and scale of a purpose-built building that is larger than nearby homes are compatible with the neighborhood. See 2006 Staff Report at 19. Staff notes that "[o]n the positive side, the proposed development . . . provides for infill development replacing abandoned and deteriorated structures that rendered the property an eyesore and a magnet for undesirable activities," and concludes that a "combination of landscaping consisting of a significant number of plant materials, fences, required setbacks and building orientation will provide adequate screening of the proposed building from the adjoining properties." 2006 Staff Report at 19.

The nature of the use proposed in this case is defined by the agreed-upon operational limits in the proposed conditions of approval, plus extensive landscaping and buffering. The dental office would be limited to 55 scheduled patient appointments per 10-hour work day, with the patients spread out at a rate of no more than five appointments in any one hour.¹⁵ This would keep the intensity of activity in the parking lot and on the walkways leading to the building at a moderate level all day, rather than having concentrated periods of intense activity that could be more noticeable to neighbors. Office personnel would be limited to two dentists and six staff members on site at any one time. Hours of operation would be within normal business hours, for the most part, impinging a bit in the early morning and, once a week, early evening, as well as half a day on Saturdays. As discussed in Part IV.A.1., the Hearing Examiner does not consider it unusual for a medical office to operate with slightly longer hours than a typical business office. The level of activity on the site would be noticeable, but with careful adherence to the proposed conditions of approval, any adverse effects should be minimal.

The building size and design would blend well with surrounding buildings on Georgia Avenue, and numerous residential elements such as sloped roofs, double-hung windows, brick and siding, and asphalt-shingle roofing would give the building the appearance of a large residence. Extensive landscaping on all sides of the building and along the parking lot edges would soften the appearance of the site and largely obscure the parking lot from the view of passerby. Wooden fencing on the east and south sides of the site would provide a noise and visual buffer for the adjacent neighbors. If the subject site were farther back on Weller Road, in the middle of the single-family neighborhood, the size of the lot and building would present a noticeable contrast with surrounding residences. At this corner location, however, the Hearing Examiner agrees with Mr. Landfair and Mr. Neyman that the proposed building would be not only compatible with the general neighborhood, but a positive addition to the landscape, particularly with the extensive landscaping proposed.

¹⁵ Emergency patients would be in addition to these limits, but their numbers are unlikely to make a significant difference. The proposed conditions include one stating that abuse of the exception for emergency patients may lead to revocation of the special exception.

For all of these reasons, the Hearing Examiner concludes that the proposed special exception would not have an adverse effect on the use and development of neighboring properties and the general neighborhood. On the contrary, it would benefit the neighborhood by keeping a valuable medical service, in a first-rate, handicapped-accessible facility, within walking distance of many residents. The residential portion of the proposed special exception would also benefit the neighborhood by adding a dwelling unit where there is currently a vacant, unused site, and by adding to the diversity of housing options.

(b) In the R-H, R-10, R-20 and R-30 zones, one or more offices for one or more medical practitioners may be permitted provided, that:

Not applicable.

C. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions:

(a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

(1) Is a permissible special exception in the zone.

Conclusion: A medical practitioner's office for use of other than a resident of the building is a permitted use in the R-90 Zone.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use would comply with the standards and requirements set forth for the use in Code §59-G-2.36, as detailed in Part IV.B. above.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any

decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: For the reasons discussed in Part II.C. above, the evidence supports the conclusion that the proposed use would be consistent with the *Glenmont Transit Impact Area and Vicinity Sector Plan*. The proposed development would satisfy the Sector Plan objective of eliminating an existing curb cut on Georgia Avenue, and would contribute to the Sector Plan goal of extending a bus way from the Metro station up to Olney, in a designated right-of-way along Georgia Avenue. It would also contribute to the Sector Plan goal of establishing pedestrian-friendly, green boulevards along Georgia Avenue by replacing a vacant lot with an attractive building surrounded by extensive landscaping, and by adding a sidewalk along Weller Road. The proposed development would serve the Sector Plan objective of expanding the range of housing choices for all income groups by creating a very nice rental unit. The proposed use would not fulfill the specific recommendation for R-90 cluster development on the site, but the text of the Sector Plan suggests that the purpose of that recommendation was to provide an incentive to a developer to move the driveway access from Georgia Avenue to Weller Road, which this development would accomplish. Moreover, relative to the 1,500 to 2,000 new residential units the Sector Plan recommended in the Glenmont area, having one unit on the subject site rather than the maximum of three units the zoning regulations would allow is de minimis in its effect. For all of these reasons, the Hearing Examiner agrees with the conclusion drawn by Community-Based Planning Staff at the MNCPPC that the proposed use would be consistent with the objectives of the Sector Plan.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: The proposed facility would add only one residential unit to the neighborhood, with little effect on population density.

As discussed in Part II.D.1. above, Technical Staff continues to believe that the proposed building is too big, and too dissimilar from nearby residences, to blend in with the prevailing character of the residential neighborhood. However, Staff concedes that to the size of the site, its location at the intersection of two roads, one of which is a major arterial, the proximity of a large church with extensive parking facilities, and the fencing, setbacks and extensive landscaping proposed for the site, would soften and counterbalance the effect of the scale and bulk of the building. Most importantly, both Staff and the Planning Board recommended approval of the petition (the Planning Board's recommendation was based on the earlier proposal with a larger building), indicating that despite misgivings, they conclude that the proposed building and use would be compatible with the neighborhood.

The current site plan has resolved the Hearing Examiner's earlier concerns about some aspects of the 2005 site plan. The smaller, redesigned building now proposed has none of the disjointed elements or barn-like facades that made the former design likely to stand out. The current proposal would be different from the low ramblers prevalent on Weller Road, particularly in terms of size, but different does not necessarily mean incompatible. The Hearing Examiner is not persuaded by Technical Staff that the proposed building would be incompatible due to its size. In part, Technical Staff's findings are undercut by their continued reliance on an incorrect square footage number when making comparisons to the 2005 site plan. More importantly, the Hearing Examiner was persuaded by Mr. Landfair's testimony that a single dwelling of a size comparable to nearby houses would look out of place on this large lot, and that the development proposed here would occupy roughly the same amount of the site overall, and less of the site frontage, as many of the nearby houses. Thus, the building would have a similar relationship to its site as that of many nearby homes, preserving the sense of green space that generally prevails in a neighborhood of single-family detached homes. The Hearing Examiner also continues to find that the site's location on this high-speed, high-volume stretch

of Georgia Avenue, and its proximity to several large churches and townhouse/apartment complexes, would allow it to blend in harmoniously with the general neighborhood.

Nearby uses would be buffered from activity on the site by a significant building setback on the south, and fencing on the south and east. The building and the parking area would be screened by significant landscaping, including existing, mature specimen trees that Petitioner's team clearly plans to make every effort to save. The parking would be located mostly behind the building, avoiding the overt commercial appearance of a front-yard parking lot. As discussed at the beginning of Part IV, some commercial appearance is unavoidable for any special exception under Section 59-G-2.36 that has two medical practitioners, because the minimum parking requirement calls for ten spaces. In this case, the commercial appearance of the parking area would be well screened by the building, landscaping and fencing.

The intensity of the use, as well traffic and parking impacts, would be limited by the proposed conditions to levels that should cause no meaningful adverse impacts.

In light of all of these elements, as well as the favorable recommendations from Technical Staff and the Planning Board, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed use would be in harmony with the general character of the neighborhood.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: For all of the reasons outlined in paragraph (4) immediately above, the evidence supports the conclusion that the proposed use would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions of approval and due to the limited nature of the outdoor activities involved, the proposed use would cause no objectionable noise, vibrations, fumes, odors, dust or physical activity at the subject site. Exterior lighting is limited to two light poles in the parking lot, which would be turned off 30 minutes after the office closes each day, plus residential-type fixtures on the building. The submitted Lighting Distribution Plan supports the conclusion that the exterior lighting would not create any objectionable illumination or glare.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: The only approved special exceptions identified within a 1,000-foot radius of the subject site are Petitioner's existing dental office and a nearby Pepco substation. See Ex. 51(b). Six other special exceptions have been identified within a few blocks of the subject property to the north, all but one on Georgia Avenue. These include a medical office, an accessory apartment, a beauty shop, a veterinary facility, a home occupation and a family practice. See *id.*

As noted earlier in this report, if the present application is approved, Petitioner intends to request a transfer of his existing medical practitioner special exception to another special exception holder. He anticipates that the transfer would be for a medical use other than a general dental practice, e.g. a pediatrician or a psychologist. Petitioner submitted, post-hearing, a very helpful analysis of the cumulative impact of these uses and the other existing special exceptions in the area, which presumably was drafted by one of his land planners.¹⁶ See Ex. 51(c). The Hearing Examiner finds this analysis persuasive. It notes that the dominant visual element around the subject site is the width, streetscape, function and traffic along Georgia Avenue, one of the County's most heavily

¹⁶ Technical Staff declined to analyze the cumulative impact of the proposed special exception and Petitioner's existing special exception, anticipating that such an analysis could be made when a transfer of the existing special exception is requested. See Ex. 27 at 21; Ex. 30. Moreover, Transportation Staff found that cumulative traffic impacts are taken into account by the Local Area Transportation Review requirements. See Ex. 56.

traveled highways. In that context, the proposed special exception would be unlikely to increase the number, intensity or scope of special exception uses in the area sufficiently to affect the area adversely. The existing special exceptions are relatively small in number, and most have been in existence for a very long time. The land uses abutting both Petitioner's existing special exception and the subject site are very stable and in excellent condition. Moreover, while the larger area surrounding the subject site is predominantly residential, the Georgia Avenue corridor in the immediate vicinity of the site has a mixed-use character, with commercial, transit and institutional uses as well as multi-family and single-family dwellings.

With the addition of the proposed building, the intersection of Weller Road and Georgia Avenue would have two small buildings on the west side of Georgia Avenue and two larger buildings on the east side – the existing Methodist Church and the proposed building. Assuming that the new holder of Petitioner's existing special exception develops a practice with about the same number of patients and employees as Dr. Dechter's current practice, the cumulative traffic impact of the two medical practitioner special exceptions would be about 69 trips in each of the morning and evening peak periods. This level of traffic is unlikely to lead to excess congestion, given the high volumes of traffic currently using Georgia Avenue.

For all of these reasons, the Hearing Examiner concludes that this requirement is met.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. As noted by Technical Staff, all medical waste would be stored in an enclosed area inside the dental clinic portion of the building.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

Conclusion: The evidence supports the conclusion that the subject property would continue to be served by adequate public services and facilities with the proposed use.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of granting the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: The proposed use would require approval of a preliminary plan of subdivision, so the adequacy of public facilities would be determined at that time. Preliminarily, Technical Staff concluded that the proposed use would not generate sufficient trips to require a traffic study under Local Area Transportation Review requirements. Policy Area Transportation Review requirements do not currently apply.

- (ii) With regard to findings relating to public roads, the Board . . . must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: The preponderance of the evidence supports a conclusion that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic, and would likely have a beneficial effect by removing a curb cut on Georgia Avenue and providing dedications to be used for public roadway improvements.

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.

Conclusion: No finding necessary.

- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: The record substantiates a finding that Petitioner has met the burden of proof and persuasion.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2629, seeking a special exception under the R-90 Zone for a medical practitioners' office, pursuant to Section 59-G-2.36 of the Zoning Ordinance, to be located at 12817 Georgia Avenue, Silver Spring, known as Parcels P911, and P912 in the St. Winexburg subdivision, be **granted** with the conditions listed below:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. Petitioner shall maintain an appointment book showing the times of all client appointments and of all emergency patient visits.
3. Petitioner shall maintain a record of the time that each employee starts and stops work each day.
4. Staffing and patient appointments must be limited as follows:
 - a. Up to two full-time dentists.
 - b. Up to a total of nine part-time (4.5 full-time equivalent) dental assistants and office staff persons.
 - c. No more than six dental assistants and/or office staff on site at any one time, in addition to the two dentists.
 - d. No more than five scheduled appointments within any hour, excluding emergency patients.
 - e. No more than 55 scheduled patient appointments per full working day, excluding emergency patients.
 - f. Abuse of the exclusion for emergency patients may result in revocation of the special exception or the imposition of additional conditions.

5. Parking lot pole lights must be turned off no later than 30 minutes after closing each work day.
6. A five-foot sidewalk must be built along the property's entire Weller Road frontage, consistent with the recommendations of Environmental Planning Staff at the MNCPPC.
7. The site plan must be revised, before the special exception takes effect, to provide for all elements shown on Exhibit 94(a), but with 14 parking spaces as shown on Exhibit 85.
8. Petitioner must submit a revised Statement of Operations, before the special exception takes effect, to reflect the increase to 14 parking spaces.
9. The site plan must be implemented with such minor revisions as agreed upon by Petitioner and Technical Staff to minimize intrusion into the critical root zones of the identified specimen trees.
10. Petitioner must comply with subdivision requirements under Chapter 50 of the County Code. At preliminary plan review, Petitioner must provide for right-of-way dedication under Section 59-G-1.21(c), (a) for truncation of right-of way of 25 feet at the corner of Georgia Avenue and Weller Road; and (b) to provide a total of 67.5 feet of right-of-way from the centerline of Georgia Avenue in accordance with the approved and adopted Glenmont Sector Plan.
11. Petitioner must submit to MNCPPC Environmental Planning Staff, before issuance of sediment and erosion control permits, a Tree Save Plan prepared by an ISA-certified arborist, which demonstrates full compliance with the requirements of Forest Conservation Law Section 22A-12. The Tree Save Plan must incorporate every effort to preserve tree number 4, a 29" Walnut, and tree number 7, a 30" Maple.
12. In the event that either or both of trees number 4 and 7 dies, they must be replaced within the next growing season with trees of a similar species and reasonable size.

13. A representation of the sign installed on the site must be provided to the Board of Appeals for its records. The sign shall be approximately the same size as and similar in appearance to the sign at Dr. Dechter's existing practice, as shown on page 36 of this report. In the event that the Petitioner requires a sign variance, proof that such a variance has been obtained must be submitted to the Board of Appeals for its records.
14. Petitioner shall inform the Glenmont United Methodist Church, in writing, that the terms and conditions of this special exception do not permit him to make his parking lot available for use by anyone other than employees, patients, or residents and their guests.
15. The special exception may not be transferred to a new special exception holder without approval from the Board of Appeals.
16. The Board of Appeals retains jurisdiction to impose additional conditions related to the driveway and/or parking, if future evidence so warrants.
17. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: December 8, 2006

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner